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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FISCHBACH AND MOORE, INC.,

Petitioner,

—v.—

PACIFIC GAS & ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Ninth Circuit reversed a judgment by the district court in favor of Petitioner, Fischbach & Moore, Inc. ("Fischbach"), remanded the case for further proceedings on the federal antitrust claims asserted by Respondent, Pacific Gas and Electric Company ("PG&E"), and ruled that, on remand, PG&E will be able to seek recovery of its alleged "cost of capital" (*i.e.*, financing costs) from the date of injury to the date of judgment as part of its antitrust damages. This case raises the following question relating to the unavailability of prejudgment interest in federal antitrust cases:

May an antitrust plaintiff seek recovery of finance costs incurred from the date of injury to the date of judgment as an element of treble damages under section 4 of the Clayton Act (15 U.S.C. § 15), which specifically provides for an award of treble damages and the costs of suit, including a reasonable attorney's fee, but precludes an award of prejudgment interest in the absence of dilatory conduct?

Rule 29.6 Statement

Pursuant to Rule 29.6, petitioner informs the Court that Fischbach & Moore, Inc., is a wholly-owned subsidiary of Fischbach Corporation. Fischbach Corporation is a wholly-owned subsidiary of American International Group, Inc. Neither Fischbach entity has subsidiaries or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully requests the issuance of a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals was deemed not for publication and is reprinted in the Appendix ("App.") at 1a-18a. The district court's June 3, 1994 order granting Fischbach's motion for judgment as a matter of law (App. 19a-40a) is unreported. The district court's July 27, 1993 order denying Fischbach's motion for summary judgment on PG&E's alleged "cost of capital" damages (App. 41a-59a), and the district court's September 13, 1993 order denying Fischbach's motion for reconsideration thereof (App. 61a-65a), are unreported.

JURISDICTION

The court of appeals entered its judgment on March 6, 1996. (App. 1a.) The court of appeals denied a timely petition for a rehearing on July 30, 1996. (App. 67a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

The district court had jurisdiction pursuant to Section 4 of the Clayton Act (15 U.S.C. § 15 (1994)), the Racketeering, Influence and Corrupt Organizations Act (18 U.S.C. § 1964(c) (1994)), and 28 U.S.C. § 1331 (1994).

STATUTE INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, is set forth in the appendix. (App. 69a-70a.)

STATEMENT OF THE CASE

In 1986, PG&E charged Fischbach and others with violating section 1 of the Sherman Act (15 U.S.C. § 1 (1994)) and RICO in connection with bids submitted for electrical work on a nuclear power plant called Diablo Canyon. The plant was built over a period of more than 17 years, beginning in 1967.

PG&E claimed that as a result of the defendants' bidrigging, it was overcharged by approximately $4 million. PG&E also sought to recover as an element of antitrust damages (subject to trebling) the alleged costs of financing the claimed overcharge, approximately $22.4 million. During the trial, PG&E's expert witness testified that PG&E financed 100% of its Diablo Canyon construction cost, and that the money was obtained partly from preferred stock and common stock issues, partly from retained earnings, and partly by borrowing. (App. 82a.)

Under the antitrust laws (section 4 of the Clayton Act, 15 U.S.C. § 15), damages recovered by a private plaintiff are automatically trebled. If PG&E proves that it was overcharged $4 million by reason of an antitrust violation, it would be entitled to approximately $12 million in trebled damages, exclusive of the costs of suit and a reasonable attorneys' fee. If, in addition, PG&E were entitled to recover financing costs as an element of damage, its recovery would be increased by at least $67 million in trebled damages, exclusive of costs and attorneys' fees.

After a five-week trial in 1993, the trial court declined to rule on Fischbach's motion for judgment as a matter of law, and sent the case to the jury. The trial resulted in a hung jury, 9-1 in favor of Fischbach. In June 1994, after further briefing and oral argument, the trial court granted Fischbach's motions seeking judgment as a matter of law on PG&E's price-fixing and RICO claims, and PG&E's claim for "cost of capital" damages. With respect to the latter motion, the trial court ruled that "anything . . . that is akin to a claim for lost opportunity costs is

not recoverable. The reason is that these costs are equivalent to prejudgment interest, which is included in the treble damage provisions of the anti-trust and RICO statutes." (App. 31a.) The district court drew a distinction between lost opportunity costs and interest payments on debt, ruling that the latter would be recoverable (*i.e.*, not the equivalent of prejudgment interest), but determined that PG&E had not met its burden of proof on the issue. (App. 33a.)

PG&E appealed the district court's rulings to the United States Court of Appeals for the Ninth Circuit. The court of appeals reversed the dismissal of PG&E's antitrust claims and held that "if a plaintiff actually established a conspiracy, then the plaintiff should recover finance costs, regardless of where the plaintiff got the funds." (App. 18a.)

The Ninth Circuit found illogical the district court's distinction between equity financing, which the district court had equated with nonrecoverable prejudgment interest, and debt financing, which the district court had said might be recoverable but was not, due to inadequate proof by PG&E. But instead of barring recovery of both kinds of finance costs as equivalent to nonrecoverable prejudgment interest, the court of appeals inexplicably held that all finance costs "reasonably certain and traceable to the breach" could be recovered. *Id.* It did so without reference to the language of section 4 of the Clayton Act (the statutory basis for recovery by a private antitrust plaintiff), Congressional intent, or a single antitrust case.

Fischbach submitted a petition for a rehearing by the court of appeals on the ability of a plaintiff to seek "cost of capital" damages in light of the general bar to recovery of prejudgment interest in an antitrust case brought under Clayton Act § 4. The court of appeals denied the petition on July 30, 1996.

REASONS FOR GRANTING THE PETITION

Summary

The court of appeals' decision in this case casts doubt on the scope of damages in antitrust litigation throughout the country.[1] The decision increases exponentially the potential recovery of private antitrust plaintiffs and the complexity of proof in private antitrust litigation. Had Congress intended this result, it might be the right one. But as this Court, the other courts of appeals that have considered the issue, and the Acts of Congress establish, Congress did no such thing.

The Ninth Circuit's failure to recognize that PG&E's finance costs are the equivalent of prejudgment interest, and therefore nonrecoverable, creates a conflict with the United States Courts of Appeals for the Second and Seventh Circuits, which have held that prejudgment interest is not an element of antitrust damages. The Ninth Circuit's decision ignores *Library of Congress v. Shaw*, where this Court rejected an attempt to escape a no-interest rule by labeling interest something else, warning that the "character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." 478 U.S. 310, 321 (1986) (citation omitted). PG&E's claim inescapably is one for interest, or the cost of using money over time. *See Barron's Dictionary of Finance and Investment Terms* 185 (2d ed. 1987).

In addition to ignoring this Court's decision in *Library of Congress* (*i.e.*, interest by any other name is still interest), PG&E's argument ignores economic reality. A plaintiff deprived of the

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[1] Although the Ninth Circuit deemed its decision "not for publication" under Ninth Circuit Rule 36-3, the decision has been published in the Trade Regulation Reporter, 1996-1 Trade Cas. (CCH) ¶ 71,340, and is available on both Westlaw, 1996 WL 102581, and Lexis, 1996 U.S. App. LEXIS 6522.

investment value of funds wrongly held by another is injured just as surely as a plaintiff who must borrow funds to compensate for the financial detriment caused by a wrongdoer. In either case, the plaintiff suffers harm equal to the time value of money. And in either case, a "no-interest" rule bars compensation for the loss of use of money over time.

The Ninth Circuit's decision also conflicts with the decisions in which the Supreme Court has refused to expand the recovery available to a private plaintiff under federal statutes. As this Court explained in *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83 (1991), courts are not empowered to expand the remedies created by Congress beyond the language of the statute and Congressional intent.

There is no ambiguity in the language of the Clayton Act or in expressions of Congressional intent regarding the availability of prejudgment interest in antitrust cases. Congress explicitly declined to make prejudgment interest an element of antitrust damages in the Antitrust Procedural Improvements Act of 1980, which limited recovery of prejudgment interest in private antitrust cases to post-complaint interest on single damages, and only then where necessary to punish dilatory conduct during litigation. This carefully circumscribed entitlement to prejudgment interest was not an oversight on the part of Congress. The Act was based on a thorough analysis of the implications of allowing prejudgment interest in antitrust cases, including a review of the Report of President Carter's National Commission for the Review of Antitrust Laws and Procedures and the testimony of prominent antitrust practitioners and scholars. If Congress had determined that private antitrust plaintiffs generally should be entitled to recover prejudgment interest, it would have said so. By ruling that PG&E may recover prejudgment interest in the guise of financing costs, the court of appeals expanded the scope of a private antitrust plaintiff's recovery in a manner inconsistent with the language of the Clayton Act and contradicted by legislative history.

Congress has made the considered determination that treble damages are almost always sufficient compensation for the time-related economic harm that a victim of an antitrust violation may suffer. The Ninth Circuit has decided otherwise. The absence of a Supreme Court ruling on the issue, coupled with the unprecedented decision of the Ninth Circuit, could result in increased complexity of proof of damages in private antitrust litigation, as well as in unwarranted, exponential increases in antitrust damage awards.

I. The Decision of the Ninth Circuit Conflicts with Decisions in the Second and Seventh Circuits which have Barred Antitrust Plaintiffs from Recovery of Prejudgment Interest in Antitrust Cases, and with this Court's Decision in *Library Of Congress* Refusing to Award Interest Regardless of How it is Characterized

Prior to the Ninth Circuit's decision, the Second and Seventh Circuit Courts of Appeals had held that, as a matter of law, a plaintiff may not recover prejudgment interest as an element of antitrust damage. These appellate courts relied on a ruling of this Court disallowing an award of prejudgment interest in cases brought under a multiple damage statute. Congress, too, has examined the issue carefully, and has approved the reasoning of these courts that treble damages are sufficient compensation for the loss of use of money over time.

In the courts below, PG&E tried to avoid the bar to recovery of prejudgment interest in antitrust cases by labelling its claim one for "finance costs." But in cases where the courts have confronted a no-interest rule, they have given short shrift to disguised claims for interest. Interest called "damages," interest called "discounts," interest called "payment for delay," interest called "earnings on investment," and interest called anything else creative legal minds may invent has been recognized as interest by virtually every court that has examined the issue, including this Court. *See Library of Congress v. Shaw*, 478 U.S. 310 (1986).

A. The Ninth Circuit is in conflict with the Second and Seventh Circuits, which have ruled that prejudgment interest is not an element of treble damages under the Clayton Act

Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), was a private antitrust action brought by TWA against the reclusive businessman, Howard Hughes, and a company owned by him. The district court entered a final judgment in excess of $145 million. On appeal, TWA challenged the lower court's denial of "moratory interest" as part of the damages sustained under section 4 of the Clayton Act. TWA argued that to be made whole, it should receive interest computed from the time the damages were sustained and trebled until the date of judgment. The panel ruled that interest was not available, explaining that "trebled damages will more than adequately compensate TWA for its injuries." 449 F.2d at 80. The court found no policy reason to award moratory interest (although there was evidence in the record from which a fact finder could determine a cost of capital), because treble damages served the remedial and penal purposes of the Clayton Act. Moreover, if Congress had wanted the courts to engage in the specific and time-consuming factual inquiries that awarding prejudgment interest would require, "including highly abstruse inquiries as to proper rates and the time from which interest should run," Congress would have said so. *Id.*

In an equally unambiguous opinion, the Seventh Circuit in *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), likewise denied plaintiff's request to recover prejudgment interest in a case brought under the federal antitrust laws. Simply put, "interest is not enumerated as a recoverable item in the statute, 15 U.S.C. § 15. Recovery of it is therefore precluded." *Id.* at 873. The panel compared the antitrust statute, silent on prejudgment interest, to the patent statute, which expressly provided for "damages, 'together with interest.'" *Id.* n.8, *quoting* 35 U.S.C. § 284.

The Seventh Court also upheld the lower court's refusal to adjust for "inflationary shrinkage" between the date of the injury (the 1950's) and judgment. While recognizing that the plaintiff's dollars recovered at the time of judgment were unlikely to equal the value of dollars lost at the time of the injury, the court held that treble damages were adequate compensation for the decreased value of money over time. *Id.* at 872.

In the absence of explicit statutory guidance or a Supreme Court decision on the availability of prejudgment interest under the Clayton Act, the Second Circuit in *TWA* and the Seventh Circuit in *Locklin* relied on this Court's decision in *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945), as support for the proposition that the Clayton Act's multiple damage award was intended to compensate for the loss of use of money over time.[2] In *Brooklyn Savings Bank*, the plaintiffs had claimed backpay awards under a section of the Fair Labor Standards Act, which provided for such backpay plus "an additional equal amount as liquidated damages." *Id.* at 699 n.1. The Court denied a request for interest, finding that liquidated double damages were intended to compensate a plaintiff for delay in payment, because delay damages might be obscure and difficult to prove. Awarding interest in addition to double damages would be duplicative. *Id.* at 715-16.[3]

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[2] Judge Wyzanski in *Cape Cod Food Prods., Inc. v. National Cranberry Ass'n*, 119 F. Supp. 900, 911 (D. Mass. 1954), did the same.

[3] The principle that multiple damages often are a substitute for incidental damages such as the time value of money has been recognized by numerous courts outside the antitrust context. *See, e.g., Fortino v. Quasar Co.*, 950 F.2d 389, 397-98 (7th Cir. 1991) (Posner, J.) ("Like most of the other circuits, we have held that if double damages are awarded prejudgment interest may not be awarded.") (collecting age discrimination cases); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971) (no prejudgment interest in light of double recovery plus a specified sum under False Claims Act); *American Timber & Trading Co. v. First Nat'l Bank of Oregon*, 690 F.2d 781, 784-86 (9th Cir. 1982) (no prejudgment interest in light of double recovery available under National Bank Act); *Nu-Life Constr. Corp. v. Board of Educ.*, 789 F. Supp. 103,

The Seventh Circuit revisited the issue in *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), involving the defendants' alleged antitrust violations in connection with the purchase of the Chicago Bulls. The court reiterated the *Locklin* rule as the rule of the Circuit, but took note of intervening, non-antitrust decisions in which courts, despite Congressional silence on the issue, had determined that an award of prejudgment interest was necessary to make the plaintiff whole. *Id.* at 561. The majority found that if there had been any doubt about Congressional intent as to antitrust cases, it had been dispelled by the Antitrust Procedural Improvements Act of 1980. *Id.*, *citing* Pub. L. No. 96-349 (1980).[4] Congress' deliberate decision to allow prejudgment interest on single damages, at the discretion of the court, *only* in cases of dilatory conduct during litigation, confirmed that the *Locklin/TWA* decisions denying prejudgment interest to antitrust plaintiffs had correctly interpreted Congressional intent. That prejudgment interest is not an element of damage in antitrust treble damage actions is a precept that should no longer be open to question in any court.[5] *See infra* § II.B.

104-106 (E.D.N.Y. 1992) (RICO); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F. Supp. 781, 811 (E.D. La. 1986) (RICO).

[4] Even Judge Easterbrook, in his dissent, acknowledged that the Act barred an award of prejudgment interest in antitrust cases filed after September 1980, except under the circumstances enumerated by Congress. As Judge Easterbrook recognized, Congress' considered decision to bar antitrust plaintiffs from recovering prejudgment interest may not be ignored by the courts, even if treble damages are inadequate in some cases. *Fishman*, 807 F.2d at 583 (Easterbrook, J., dissenting).

[5] *Accord Trio Process Corp. v. L. Goldstein's Sons, Inc.*, 638 F.2d 661 (3d Cir. 1981), where the Third Circuit was asked to clarify its ruling on damages in a patent infringement case. The court compared the patent statute (35 U.S.C. § 284), which allows an award for multiple damages plus prejudgment interest on single damages, with section 4 of the Clayton Act (15 U.S.C. § 15), which does not. In *dicta*, citing, among other cases, *TWA*, the court noted that under the Clayton Act, treble damages are "designed to take the place of "interest. *Id.* at 663. "For this reason prejudgment interest has been held to be impermissible as

B. The Ninth Circuit's decision conflicts with this Court's decision in *Library of Congress v. Shaw* because the Ninth Circuit failed to recognize that cost of capital is the equivalent of prejudgment interest

PG&E, faced with the overwhelming authority precluding recovery of prejudgment interest in antitrust cases, tried to avoid the issue altogether by characterizing its claim for prejudgment interest as one for "financing costs" or "cost of capital." The Ninth Circuit adopted PG&E's mischaracterization, and did not address the unavailability of prejudgment interest at all. Instead, it focused on PG&E's claim as though it were a matter of contract law, and directed that all finance costs could be recovered if proven to be "reasonably certain and traceable to the breach." (App. 18a.) The Ninth Circuit's distinction between finance costs and prejudgment interest is insupportable, as a matter of law or common sense.

1. There are a number of ways to finance a large construction project. A company may use retained earnings, which are "net profits kept to accumulate in a business after dividends have been paid." *Barron's Dictionary of Finance and Investment Terms* 341 (2d ed. 1987). Alternatively, a company may issue stock, and use the money it receives in return to finance the project. If a company uses retained earnings or capital received in exchange for stock to finance construction, it forgoes the money it could have made over the life of the project had it used those sums for another purpose, or deposited the money in the bank ("opportunity costs"). A third way in which a company may finance large construction projects is by borrowing money, either by issuing bonds or borrowing from a financial institution, and paying interest on the borrowed money. If a company borrows money, it can invest its retained earnings in other ways and benefit from the return on its

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an element of damages in a suit under § 4 of the Clayton Act." *Id.*

investment throughout the life of the project, but it must pay interest for the term of the loan.

Regardless of how the project is financed, there is a cost associated with the use of money over time. Whether called lost opportunity costs (of money that could have been invested), or interest payments (on money that was borrowed), it is still the cost of using money over time. Prejudgment interest is a surrogate for lost opportunity costs or the cost of a loan that would not have been incurred but for defendant's wrongdoing. Prejudgment interest is a way of making a plaintiff, deprived of a sum over a period of time, whole. *See West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). When the rate is fixed by statute or by the court, it eliminates the need for a plaintiff to prove actual lost opportunity costs or interest payments incurred between injury and judgment. Conversely, when a plaintiff recovers its actual interest paid or lost opportunity costs, it eliminates the need for an award of prejudgment interest at the statutory rate, because such an award would be duplicative. *See, e.g., Intermeat, Inc. v. American Poultry, Inc.*, 575 F.2d 1017, 1024-25 (2d Cir. 1978) ("We . . . direct the District Court to amend the judgment by withdrawing the award of statutory interest for those periods during which the seller incurred financing charges directly attributable to the [rejected shipments], and awarding in lieu thereof the finance charges actually incurred."); *Bulk Oil (U.S.A.), Inc. v. Sun Oil Trading Co.*, 697 F.2d 481, 485 (2d Cir. 1983) ("Having recovered its actual [financing payments on a loan that it would have paid off had the contract not been breached] . . . . [a]n award of statutory interest would amount to a double recovery.").

The testimony of PG&E's damage expert is instructive on this point. PG&E's expert testified that PG&E financed 100% of the cost of the Diablo Canyon Project, and that the money was obtained through a combination of short and long-term borrowing, issuance of common and preferred stock, and use of retained earnings. (App. 82a.) To determine PG&E's cost of financing the

alleged overcharge, he calculated an interest rate for each year for a period of twenty years (from the date of the overcharge until the end of the year of trial), and then multiplied it by the alleged overcharge and outstanding financing costs for each year. (App. 74a, 80a.) In his first study, PG&E's expert used "weighted average cost of capital" as interest, based on an analysis of PG&E's work papers that reflected calculations of financing costs that PG&E used when it recorded its construction costs. (App. 76a.) He did an alternative calculation in which he used short-term financing costs of PG&E as the applicable yardstick. (App. 85a.)

PG&E's method of calculating its financing costs is similar to a method commonly used to calculate prejudgment interest in patent cases. *See, e.g., Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1066 (Fed. Cir. 1983) (awarding prejudgment interest at prime rate is proper given proof that plaintiff borrowed at or above prime); *CVI/Beta Ventures, Inc. v. Tura LP*, 905 F. Supp. 1171, 1203 (E.D.N.Y. 1995) (awarding prejudgment interest based on plaintiffs' borrowing costs). PG&E's financing costs were five to six times the overcharge, according to its expert, because "interest rates and other costs of obtaining capital were high," and because PG&E was seeking costs covering a twenty-year period, from 1973 through the end of 1993 (the end of the year in which the trial took place). (App. 79a.) He explained that "this is exactly what would happen . . . if you had a credit card balance of $100 and an interest rate of 10% and for some reason didn't pay off your credit card for 20 years. You would end up with accumulated interest similar to this or the same as . . . this." (App. 81a.)

PG&E's expert repeatedly admitted the true nature of his damage calculation, for example stating that he "calculated interest only from the end of the year for each successive year until 1993" (App. 75a). On cross-examination, counsel for Fischbach asked "[w]hen you figured the interest every year from 1973 through 1993, did you figure the interest on the total [overcharge]," to which PG&E's expert responded "[y]es, I did." (App. 91a.) In

response to a question about whether the "rate of interest that you charged, was that a rate of interest based solely on the rate at which PG&E borrowed money, or did that rate include a mix of the rate at which PG&E borrowed money and the rate at which PG&E had a cost of capital based on common stock and preferred stock," PG&E's expert replied "[i]n my first calculation it was a weighted average which included both . . . And the short-term interest one, it only included an interest rate." (App. 92a.)

The evidence, however characterized, was an effort to show PG&E's cost of the loss of use of money over time, or prejudgment interest. *See West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987) ("Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered . . . .").

2. By failing to apply the no-interest rule to PG&E's claim for cost of capital damages, the Ninth Circuit ignored the dictates of the Supreme Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986). In *Library of Congress*, the district court had increased the lodestar by 30% in awarding attorneys' fees to the respondent, a successful plaintiff in a Title VII case. The extra 30% was to compensate counsel for the delay between performance of services and payment. The court of appeals for the District of Columbia Circuit recognized that compensation for delay was the equivalent of interest, but affirmed on the grounds that Congress had waived the government's immunity to awards of prejudgment interest in Title VII. 747 F.2d 1469, 1479 (D.C. Cir. 1984).[6] The Supreme Court reversed, rejecting both the waiver argument and

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[6] As the Circuit Court for the District of Columbia put it:

> If the delay factor sounds like interest, acts like interest and, most of all, compensates exactly as interest would, we feel constrained to treat it as interest for purposes of the sovereign immunity rule.

Shaw v. Library of Congress, 747 F.2d 1469, 1474-75 n.41 (D.C. Cir. 1984), *aff'd in part, rev'd in part on other grounds*, 478 U.S. 310 (1986).

respondent's contention that the no-interest rule does not prohibit compensation for delay.

This Court was unequivocal. Interest is interest, whether divided into its components, like inflation and the opportunity costs of capital, or labeled something else, like compensation, penalty or damages. Justice Blackmun wrote:

> [T]he force of the no-interest rule cannot be avoided simply by devising a new name for an old institution: "[T]he character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty' or any other term, because it is still interest and the no-interest rule applies to it."

Id. at 321, *quoting United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976).

Of particular interest here is the Court's rejection of the argument that there is a difference between "interest" and a "delay factor." Both, emphasized the Court, are "designed to compensate for the belated receipt of money." *Id.* at 322. Calculation of an interest rate reflects both the real opportunity cost of capital and the inflation rate. And recovery of either is prohibited by the no-interest rule. *Id.* & n.7 (emphasis added) (*citing* Richard A. Posner, *Economic Analysis of Law* 180 (3d ed. 1986)). Given the Ninth Circuit's conclusion that all financing costs -- lost opportunity costs and debt costs -- should be treated the same, it is difficult to understand how the Ninth Circuit could permit PG&E to seek recovery of its financing costs as damages.

3. *Library of Congress* did not make new law. It was this Court's forceful and direct articulation of an obvious concept -- prejudgment interest is compensation for the loss of use of money over time, regardless of the manner in which plaintiff incurs that

loss. If prejudgment interest is unavailable as a matter of law, then a plaintiff may not recover for lost opportunity costs or interest on debt, any more than it may recover prejudgment interest at a statutory rate. *United States v. Mescalero Apache Tribe,* 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976), the principal case on which *Library of Congress* relied, and the line of cases which gave rise to the *Mescalero* decision, make this point clearly.

In *Mescalero*, the government appealed an order of the Indian Claims Commission awarding interest on "Indian Money, Proceeds of Labor" funds held by the government from 1883-1929 without paying interest. Notwithstanding the equities, the Court of Claims held that it was without power to award interest in the absence of an express waiver of sovereign immunity (as ultimately occurred in 1929 and 1930). *Id.* at 1330-31.

Like PG&E, the Indian Claims Commission in *Mescalero* attempted to avoid the "no-interest" rule by calling interest "damages." Recognizing this argument as an elevation of form over substance, the Court of Claims collected cases in which efforts to avoid bars to the recovery of interest by calling interest "damages" had been rejected.[7] In *Myerle v. United States,* 33 Ct. Cl. 1 (1897), for example, the government was held responsible for seven years of delay in the completion of the monitor Monadnock. As a result of the delays, the contractor (Myerle) was forced to borrow money. Plaintiff (Myerle's estate) claimed that it was entitled to recover the interest paid on the loans as an extra expense, but the Court of Claims disagreed. The court explained that the claim for interest paid on the loan was simply a claim for prejudgment interest, barred by the rule that interest may not be recovered against the government:

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[7] The *Mescalero* Court took note of the observation of former Chief Judge Jones that "calling a billy goat a horse did not make him one." *Id.* at 1322 n.1, *quoting Union Pac. R.R. Co. v. United States*, 91 F. Supp. 762 (Ct. Cl. 1950).

> As to the interest on the borrowed money: The delay forced the contractor to borrow money to carry on his contract; for this he was forced to pay interest, an extra expense. The recovery of this sum in this court is forbidden by statute: whether it be claimed in the guise of a damage caused by delay, or in some other form, it remains in fact a claim for interest and such a claim we are prohibited from allowing. . . . The distinction by plaintiff sought to be made, is one of terms only, not of substance. If plaintiff had used his own money and so lost the interest which it might have earned for him, the claim would have been as meritorious, but would not have differed in principle from that now made.

Id. at 25 (citation omitted).

In *Moran Bros. Co. v. United States*, 61 Ct. Cl. 73 (1925), another case cited by *Mescalero*, the question involved recovery of lost opportunity costs, rather than the debt payments at issue in *Myerle*. In *Moran*, the plaintiff sued the United States for compensation due in connection with the construction of a battleship for the Navy. There were delays in completion of the vessel, some of which were attributable to the government, and the contractor claimed that it was entitled to "increased capital investment during the period of delay measured by interest." *Id.* at 105. Quoting *Myerle*, the Court of Claims found that the lost opportunity costs sought by the plaintiff were the same as the interest on borrowed money paid by Myerle, and both were interest which the plaintiffs could not recover from the government. *Accord Cherokee Nation v. United States*, 270 U.S. 476, 490 (1926); *United States ex rel. Angarica v. Bayard*, 127 U.S. 251, 259-60 (1888); *Ramsey v. United States*, 101 F. Supp. 353, 356-57 (Ct. Cl. 1951), *cert. denied*, 343 U.S. 977 (1952).

4. More recent cases likewise demonstrate that interest, debt payments and equity financing are economic equivalents: where

recovery of interest is barred, the result does not change with the form the interest takes.

In *Preston v. United States*, 776 F.2d 754 (7th Cir. 1985), decided by the Seventh Circuit one year before *Fishman* and *Library of Congress*, the issue was whether farmers should be able to recover for the value of the use of grain that the Commodity Credit Corporation had used for itself over a period of twelve years. The plaintiffs urged the court to distinguish between compensation for the loss of use of the converted grain, and prejudgment interest, which the plaintiffs acknowledged they could not recover under the Federal Tort Claims Act. Explaining that the bar to recovery of prejudgment interest precluded any award of damages for "disadvantage or loss to the plaintiff occasioned by the fact that payment of the damage award occurred some months or years after the injury was suffered," the court denied the plaintiffs' claim. *Id.* at 760.

The Seventh Circuit cited to *Southern Pacific Transportation Co. v. United States*, 471 F. Supp. 1186 (E.D. Cal. 1979), a well-reasoned district court opinion in which the court refused to award the Southern Pacific compensation for the loss of the use of its corporate capital resulting from an explosion caused by government-owned cars at a Southern Pacific yard. Southern Pacific argued that it was entitled to compensation for loss of use of capital that it would have devoted to other projects besides repair of the yards, and that it could calculate the return on capital that it would have earned but for the explosion. According to Southern Pacific, the actual monetary losses resulting from the loss of use of its capital were distinguishable from prejudgment interest, which it was barred from recovering under the Federal Tort Claims Act. The court disagreed, because "the phrase 'interest prior to judgment' must mean compensation for the use of money damages prior to the judgment awarding those damages." 471 F. Supp. at 1197. The court noted:

> No rational distinction can be drawn between the interest paid on a loan necessitated by the explosions and the losses occasioned by what amounts to an internal loan whereby Southern Pacific withdrew funds allocated for one project to reassign them to the reconstruction of the trainyard. Both claims would constitute compensation for the use of money. If a company uses its own funds, then it suffers a loss of use of capital that might have otherwise generated a profit and it is damaged to the extent of the loss of that anticipated profit. If the company uses funds borrowed from another entity, then it suffers under a requirement that it pay interest on the loan, which requirement occurs because the award of damages has not yet been paid. Under this logic, neither injury is compensable because of the bar to awards of prejudgment interest.

Id. at 1199 n.5.

In *Marchese v. United States*, 781 F. Supp. 241 (S.D.N.Y. 1991), the Southern District of New York had an opportunity to consider a claim for an award of prejudgment interest from the government (which the plaintiff called "damages") in light of *Library of Congress*. *Marchese* involved a claim against the Federal Deposit Insurance Corporation (the "FDIC") for interest owed on certificates of deposit that the FDIC withheld after being appointed receiver of an insolvent bank. Approximately five years elapsed between the time the FDIC seized the certificates and the time it returned the principal to the plaintiffs. Relying on *Library of Congress* and *Preston*, the court decided that an award of interest on the notes was the equivalent of prejudgment interest, and not a claim for damages.

5. In contrast to the carefully reasoned opinions discussed above, the Ninth Circuit inexplicably adopted PG&E's arguments, which relied on two wrongly-decided district court antitrust cases, one of which simply cited the other, and contract cases, which, unremarkably, awarded plaintiffs prejudgment interest on single

damage contract claims. In *Minpeco, S.A. v. Hunt,* 686 F. Supp. 420 (S.D.N.Y. 1988), the cornerstone of PG&E's argument below, the district court awarded the plaintiff damages for the defendant's antitrust violations arising from alleged manipulation of the silver market. The court allowed the plaintiff to recover interest that the plaintiff had paid on loans it took to meet margin calls and close silver futures and forward positions as a result of defendant's alleged wrongdoing. The *Minpeco* court did not cite *TWA*, the controlling Second Circuit case which it should have followed.

Instead, *Minpeco* relied on *Bulk Oil, Inc. v. Sun Oil Trading Co.*, 697 F.2d 481 (2d Cir. 1983), a contract case decided under the Uniform Commercial Code and New York's Civil Practice Law and Rules. In *Bulk Oil,* the plaintiff/seller had taken out a loan to finance the purchase of fuel oil that the plaintiff had agreed to sell to the defendant. When the defendant breached the contract by refusing to pay, the plaintiff was unable to pay back the loan and continued to pay interest. Citing U.C.C. §§ 2-709 and 2-710, which provide for incidental damages in the case of a breach of contract, the court awarded damages that included the amount of the post-breach interest payments. Then, citing CPLR § 5001, which provides for an award of interest on damages for breach of contract, the court awarded prejudgment interest on those incidental damages.[8] The *Minpeco* court failed to recognize that *Bulk Oil* simply applied principles of contract law codified by state

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[8] Significantly, the court refused to award interest on the direct damage award (the amount that the defendant should have paid to plaintiff under the contract), stating that statutory prejudgment interest would duplicate the award for interest payments on the loan. In other words, the *Bulk Oil* court recognized what the Ninth Circuit and the *Minpeco* court did not: loss of the use of money (in Bulk Oil's case, the contract amount) is the same as payments on a loan that would have been paid off but for the defendant's wrongdoing. Both are interest. *Bulk Oil,* 697 F.2d at 485-86.

statutes, and was no authority at all for an award of prejudgment interest in a federal antitrust case.[9]

The Ninth Circuit Court of Appeals in this case labored under the same misconception as the trial court in *Minpeco*. The Ninth Circuit cited only one case (not an antitrust case) in the portion of its opinion dealing with the recovery of prejudgment interest, and that case was only cited to show that it did not support different treatment for debt and equity financing in connection with a damage recovery. (App. 17a-18a) (*citing Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 1992 U.S. Dist. LEXIS 7721 (N.D.N.Y. May 23, 1992)). After concluding that there should be no difference, the Ninth Circuit completely bypassed the issue of whether prejudgment interest is recoverable in an antitrust case. Without explanation, and without reference to section 4 of the Clayton Act, *Library of Congress, Brooklyn Savings Bank, TWA, Fishman, Locklin, Preston, Southern Pacific Transportation, Marchese, Mescalero, Myerle, Moran, Trio Process,* Congressional intent, the Antitrust Procedural Improvements Act of 1980 or any of the other cases and commentaries prohibiting awards of prejudgment interest regardless of its form, the Ninth Circuit held that if PG&E could prove that financing costs were "reasonably certain and traceable to the breach [then PG&E] should recover finance costs, regardless of where [PG&E] got the funds." (App. 18a.)

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[9] The only other antitrust case that PG&E cited in support of its argument was *United Power Ass'n, Inc. v. L.K. Comstock & Co.*, 1992-2 Trade Cas. (CCH) ¶ 70,055 (D. Minn. Oct. 27, 1992). The court in *United Power* relied exclusively on *Minpeco*, and concluded that because the "interest plaintiffs paid in excess of what they would have paid absent the alleged bid rigging is a reasonably foreseeable component of actual damages," plaintiffs should be able to claim the increased "financing costs (e.g., the interest)" as damages subject to trebling. *Id.* at p. 69,213. Like the Ninth Circuit, the court missed the point. The issue is not whether PG&E's interest payments are the direct and foreseeable result of an antitrust violation, but whether PG&E is entitled to claim them as a component of its antitrust damages, regardless of whether it suffered actual damage by making the payments.

The Ninth Circuit missed the point. The question is not *whether PG&E is able to prove* its cost of capital damages, the question is *whether PG&E should be entitled to prove them at all.* The answer is no. In ruling otherwise, the Ninth Circuit created a conflict with other Circuits and with this Court that should be resolved by this Court.[10]

II. The Court of Appeals' Decision Expands the Scope of Recovery by Antitrust Plaintiffs Beyond that which Congress Intended, in Conflict with Decisions of this Court

This Court has ruled, over and over again, that it is Congress' prerogative to decide, and to articulate, what remedies should be available to private plaintiffs under federal law. Like all antitrust plaintiffs, PG&E may have been damaged by the delay between injury and judgment (if it suffered antitrust injury at all). Nonetheless, those losses are not compensable under the Clayton Act, except to the extent trebling of the overcharge compensates a plaintiff for such loss. The Ninth Circuit's decision invites plaintiffs to increase the complexity and length of federal litigation, and to increase their awards exponentially, in a manner that Congress never intended.

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[10] Other courts, before and after *Library of Congress*, also have rejected claims of disguised interest in cases involving a no-interest rule. *See, e.g., Chiu v. United States*, 948 F.2d 711, 719 (Fed. Cir. 1991) (refusing to make an upward adjustment to EAJA fee award to compensate for the time value of money); *J.D. Hedin Constr. Co. v. United States*, 456 F.2d 1315, 1330 (Ct. Cl. 1972) (denying a claim for interest paid on a bank loan incurred due to the government's breach because equivalent to interest); *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 759 F. Supp. 219, 234-35 (E.D. Pa. 1991) (rejecting claim for "opportunity cost" damages as equivalent to prejudgment interest), *aff'd in part, rev'd in part on other grounds*, 998 F.2d 1144 (3d Cir.), *cert. denied sub nom. Bessemer & L.E.R.R. v. Republic Steel Corp.*, 510 U.S. 1091 (1993); *Barrett v. United States*, 660 F. Supp. 1291, 1319-20 (S.D.N.Y. 1987) ("Plaintiff's request that its award be adjusted for the time value of money is . . . an attempt at an end run around [a no-interest rule].").

A. This Court has ruled that the remedies provided by Congress in federal statutes creating private rights of action should not be expanded by the courts

Although this Court has never decided whether prejudgment interest, described as "cost of capital" or anything else, may be a component of damages under section 4 of the Clayton Act, it has ruled on a similar issue cases arising under other federal statutes. *See, e.g., Library of Congress, supra.* In *Brooklyn Savings Bank v. O'Neill,* 324 U.S. 697 (1945), discussed above, the Court held that the plaintiff could not recover interest on compensation awarded under the statute, because liquidated, double damages was the statutory remedy, and the only remedy, for delay in payment. Justice Reed wrote:

> Since Congress has seen fit to fix the sums recoverable for delay, it is inconsistent with Congressional intent to grant recovery of interest on such sums in view of the fact that interest is customarily allowed as compensation for delay in payment. To allow an employee to recover the basic statutory wage and liquidated damages, with interest, would have the effect of giving an employee double compensation for damages arising from delay in the payment of the basic minimum wages. . . . Allowance of interest on minimum wages and liquidated damages recoverable under § 16(b) tends to produce the undesirable result of allowing interest on interest. . . . Congress by enumerating the sums recoverable in an action under 16(b) meant to preclude recovery of interest on minimum wages and liquidated damages.

Id. at 715-16 (citations omitted). The mandate is clear -- where Congress has defined the scope of compensation, the courts are not free to supplement the Congressional award, regardless of whether, in some cases, the plaintiff may be left with a loss. *See also Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988) (under FELA, plaintiff is not entitled to prejudgment

interest due to lack of Congressional intent to award prejudgment interest and considerable judicial authority that it should not be awarded); *Library of Congress*, 478 U.S. at 320-23; *Fishman v. Estate of Wirtz*, 807 F.2d at 561-62.

The Supreme Court also refused to interpolate a broader damage provision than the one Congress had written in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), consolidated cases brought under the antitrust and civil rights laws. In *Crawford,* the Court held that a plaintiff could not recover more than statutory witness fees for experts absent "explicit statutory or contractual authorization for the taxation of the expenses of a litigant's witness as costs." *Id.* at 445.

Similarly, in *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83 (1991), this Court ruled in a civil rights case that expert fees could not be recovered as part of a reasonable attorney's fee absent a specific statutory provision. In so ruling, the majority relied heavily on a comparison of the civil rights statute with numerous other federal statutes which expressly provide for shifting of expert fees, *id.* at 88-92, and on court decisions which had concluded that expert fees and attorneys fees were separate items of cost. *Id.* at 92-97. Justice Scalia, writing for the Court, refused to read into the statute a provision for shifting of expert fees when Congress had not written one, despite the "broad remedial purpose of the statute." Nor would the Court assume that Congress had simply forgotten to consider the issue, and had Congress considered it, the statute would read differently. *Id.* at 100. Explaining why the Court may not augment federal statutory recovery under the "attribution of forgetfulness" by Congress, the Court quoted with approval *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) (Brandeis, J.):

> The statute's language is plain and unambiguous. What [the plaintiff] asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was

> omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

499 U.S. at 101.[11]

The Ninth Circuit's decision similarly "transcends the judicial function." By ruling that PG&E may seek finance costs, the court of appeals added a new dimension to a private antitrust plaintiff's recovery under section 4 of the Clayton Act, an element that is inconsistent with the language added to the statute in 1980, and the extensive legislative history of that amendment.

B. Congress has authorized only post-complaint prejudgment interest on single damages when necessary to punish dilatory behavior by an antitrust litigant

In the case at bar, there is no need to divine what Congress would have said had it considered the issue of availability of prejudgment interest in an antitrust case. In 1979 and 1980, Congress extensively considered the question of prejudgment interest before amending the Clayton Act in the Antitrust Procedural Improvements Act of 1980. Pub. L. No. 96-349, 94 Stat. 1154 (1980). The foundation of Congress' analysis was a report by a panel of antitrust experts appointed by President Carter to study the effective administration of the antitrust laws. *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures* (1979) (the "Report").

The Report discussed the *TWA* case and the lack of existing authority for an award of prejudgment interest in antitrust cases.

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[11] In light of the *West Virginia University Hospitals* and *Library of Congress* decisions, Congress amended the Civil Rights Act to provide for an award of expert fees and prejudgment interest. Pub. L. No. 102-166, 105 Stat. 1071 (1991).

Vol. I at 90-91. A majority of commissioners recommended that courts automatically award post-complaint simple interest on actual (not treble) damages unless the court determined that the circumstances made such an award unjust, while Congressman Seiberling suggested giving judges discretionary authority to award prejudgment interest only upon a finding of dilatory conduct by a defendant. *Id.* at 91.

Congress itself cited *TWA* for the proposition that "there is no clear authority for awarding prejudgment interest in antitrust cases." H.R. Rep. No. 875, 96th Cong., 2d Sess. 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2766, 2769. Congress also heard testimony of prominent jurists and members of the antitrust bar on the need to curb dilatory conduct by antitrust litigants, as well as the view that treble damages were generally adequate compensation for damages such as the losses attendant to the delay between that injury and judgment. *See, e.g., id.* at 6 (testimony of Judge Charles Renfrew that prejudgment interest would be a "windfall" because "a treble damage award in most circumstances adequately compensated a successful plaintiff for his loss occasioned by a violation of the antitrust laws").

Throughout its consideration of the issue, Congress was aware of the fact that an antitrust plaintiff suffers economic losses for the period between injury and judgment. *See id.* at 2-3 ("Delay *increases* the period during which any eventual monetary awards . . . can be retained for the defendant's interest-free use.") (emphasis added); *id.* at 4 (same); *id.* at 12-13 (letter from Assistant Attorney General John Shenefield stated that delay has the effect of "*extending* the period during which an amount eventually paid to the plaintiff is retained by the defendant for profitable use.") (emphasis added). Moreover, Congress was specifically aware of the fact that an antitrust plaintiff might incur such losses in the form of interest payments on loans. *See id.* at 3 ("a plaintiff is already penalized for delay; he is denied the use of his money during the litigation with no adjustment for inflation or the *interest cost of borrowing money elsewhere.*") (emphasis

added). Nonetheless, Congress rejected a presumptive award of prejudgment interest to an antitrust plaintiff, opting instead for a limited award of post-complaint simple interest on single damages when necessary to punish dilatory conduct. *See id.* at 6 and 9-10; *see also* H.R. Conf. Rep. No. 1234, 96th Cong., 2d Sess. 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2781, 2783.

In contrast, because the government could receive only single damages for an antitrust violation, Congress authorized the award of post-complaint prejudgment interest on single damages only in cases of dilatory conduct or when "necessary to compensate the United States adequately for the injury sustained by the United States." 15 U.S.C. § 15a(4) (1994); *see* H.R. Rep. No. 875, 96th Cong., 2d Sess. 7 (1980) ("even if treble damages adequately compensate most plaintiffs for losses in treble damage actions . . . no treble damages are available to the United States . . . . Accordingly, the committee added language . . . requiring the court to consider compensation as a factor in its decision as to whether it is just under the circumstances to award prejudgment interest in a single damage action brought by the United States.").

Congress considered the issue of prejudgment interest in antitrust cases again when it enacted the National Cooperative Research Act of 1984. Pub. L. No. 98-462, 98 Stat. 1815 (1984). Under that law, covered cooperative ventures may be sued under the antitrust laws, but only for "actual damages sustained by such person." 15 U.S.C. § 4303(a) (1994). Because the antitrust damage award is not trebled, an injured party may receive interest "for the period beginning on the earliest date for which injury can be established and ending on the date of judgment." 15 U.S.C. § 4303(d). Both the Senate and the House Conference Reports illustrate that prejudgment interest is awarded for the entire period between injury and judgment because of the unavailability of treble damages. *See* S. Rep. No. 427, 98th Cong., 2d Sess. 13-14 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3105, 3110; H.R. Conf. Rep. No. 1044, 98th Cong., 2d Sess. 12-13 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3131, 3136-38.

C. The Court of Appeals' decision presents an important question arising under federal law that will impact proof of damages in private antitrust litigation, and that has not been, but should be, settled by this Court

The Supreme Court never has ruled expressly that a private antitrust plaintiff may not recover prejudgment interest. Now that a respected federal appellate court has ruled that antitrust plaintiffs should have an opportunity to prove cost of capital damages (*i.e.*, that such damages are not the equivalent of prejudgment interest), it is critical that this Court resolve the issue with finality. In the absence of a ruling by this Court, the Ninth Circuit's decision will encourage antitrust plaintiffs (and other plaintiffs facing a "no interest" rule) to seek prejudgment interest in the form of cost of capital damages, increasing the complexity and length of private antitrust litigation and increasing potential damage awards in a manner not intended by Congress.[12]

In the antitrust context, Congress has decided that multiplying the amount of a discrete economic injury functions as a surrogate for damages attendant to the delay between that injury and judgment. Like all statutory substitutes, a damage multiplier runs the risk of over- or undercompensating the injured party. But Congress and the courts have been willing to allow some divergence because treble damages adequately compensates most plaintiffs and, as *Brooklyn Savings Bank* and *TWA* recognized, the use of a statutory substitute avoids difficult problems of proof,

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[12] The effect of the Ninth Circuit's decision is not limited to antitrust cases. Every federal plaintiff that faces a "no-interest" rule will be encouraged to engage in the same semantic subterfuge as PG&E. At the least, such efforts will waste judicial resources; at worst, they will further subvert Congress' will.

thereby conserving scarce judicial resources and furthering consumer welfare.[13]

If Congress had remained completely silent, there might still be room for an argument that antitrust plaintiffs should be entitled to prove that they incurred financing costs that they would not have incurred absent a violation, however complicated such proof might be. The fact of the matter is that Congress has spoken. The decision of the Ninth Circuit threatens to upset the Congressional and judicial balance between solicitude for the victim of allegedly anticompetitive conduct and the effective enforcement of the antitrust laws.

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[13] In this case, the very difficulties of proof to which *Brooklyn Savings Bank* and *TWA* alluded have materialized. On remand, pursuant to the Ninth Circuit's decision, PG&E would have to trace particular finance costs to any antitrust violation found during the retrial. *See, e.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-47 (1977) (allowing direct purchasers to recover the entire amount of an overcharge in light of the impact of the "passing-on" theory on the effective administration of the antitrust laws).

CONCLUSION

Fischbach and Moore's petition for a writ of certiorari should be granted.

Dated: New York, New York
October 21, 1996

Respectfully submitted,

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APPENDIX

Decision of the Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16162

March 6, 1996

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff-Appellant,

--v.--

HOWARD P. FOLEY COMPANY, INC., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Northern California
Spencer Williams, District Judge, Presiding
(Cv. No. 85-2922 SW)

Argued and Submitted: December 5, 1995

Before:

GOODWIN and REINHARDT, *Circuit Judges*,
and KING,* *District Judge*.

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* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

MEMORANDUM**

Plaintiff, Pacific Gas & Electric Company ("PG&E" or "Plaintiff" or "Appellant"), sought treble damages for the period 1972-1977 during which it paid Defendant Howard P. Foley Company, Inc. ("Foley") contracting company cost-plus 15%, a rate which PG&E alleges was possible only as a result of bid-rigging in violation of either the Sherman Act or RICO or both. PG&E alleges that a competitive fee during that time period would have been between cost-plus 4% and cost-plus 8%. PG&E calculates the excess fees as between $3.5 million and $4.6 million. PG&E also sought to recover as damages, to be trebled, the cost of financing these excess charges and calculates these financing costs as between $17.5 million and $22.4 million.

After a long jury trial in which the jury was unable to agree on a verdict, the court declared a mistrial. The court then considered Fischbach & Moore's motions for judgment as a matter of law, pursuant to Rule 50(a) at the close of PG&E's case and pursuant to Rule 50(b) after the parties had rested, and granted both motions. PG&E argues that a new trial should have been ordered.[1]

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] The original complaint named nine corporations and eight individuals. Prior to the commencement of trial on November 1, 1993, PG&E had reached settlements with all of the non-Fischbach defendants except for Bancroft T. Foley who was defaulted for non-appearance at the trial. Trial commenced against only Fischbach & Moore, Inc. and two of the individuals who had been officers of Fischbach & Moore at relevant times. Motions for judgment as a matter of law were made by the two individuals as well, but they finalized a settlement with PG&E before the court's order and were therefore dismissed from this action. Fischbach Inc. seems to have slipped through the cracks.

A separate appeal, No. 94-16379, had been consolidated with this appeal, but that appeal was settled under the Settlement Conference Program.

I.

The excess charges alleged by PG&E were incurred in the course of the construction for PG&E of a two-unit nuclear power plant called Diablo Canyon. The plant was built over a period of more than 17 years from the issuance of initial regulatory approvals on November 7, 1967, using independent contractors in many trade disciplines under PG&E's direct supervision.

The final cost of constructing Diablo Canyon, including financing costs, was approximately $5.6 billion. The largest single contractor at the plant was the Howard P. Foley Co., Inc., which performed most of the required electrical work. PG&E paid Foley at least $425 million for its work at Diablo Canyon.

PG&E let three contracts for electrical work at Diablo Canyon, designated as Contract 8807, Contract 8802, and Contract 8808, which are relevant to this case. Any electrical contractor interested in bidding for work at Diablo Canyon had to qualify itself as competent.

In March 1969, PG&E invited a number of electrical contractors, including Fischbach, to qualify. Subsequently, PG&E invited the qualified bidders to submit competitive bids for Contract 8807 in three distinct parts--a "lump sum" or "fixed" price, a "cost-plus" price, and several "unit" prices. Fischbach, Foley, and others submitted bids which were evaluated by PG&E. In February 1970, PG&E awarded Contract 8807 to the low bidder, Foley, an original defendant in the suit filed by PG&E.

Some time later, PG&E issued plans and specifications for Contract 8808 and received seven bids, in the same tripartite format as for Contract 8807, including one from Fischbach. In July 1971, Contract 8808 was awarded to Wismer & Becker Contracting Engineers, Inc. ("Wismer & Becker"), another original defendant in the suit filed by PG&E.

On July 29, 1971, shortly after awarding Contract 8808, PG&E invited Foley, Wismer & Becker, and L.K. Comstock & Company, Inc. ("Comstock") to submit bids for Contract 8802. Wismer & Becker did not bid. The contract was awarded to Foley as the lower bidder.

Once Foley was on-site performing Contracts 8807 and 8802, PG&E decided to consolidate those contracts into one. Effective September 1, 1972, the remaining work under Contract 8807 was "rolled into" Contract 8802 and under the price terms of Contract 8802.

On December 17, 1973, PG&E and Foley agreed to modify the price terms of Contract 8802. The parties agreed that work performed at Diablo Canyon by Foley retroactively from February 24, 1972 and thereafter would be paid for on a cost-plus 15% fee basis instead of the cost-plus 25% fee in Foley's bid. This fee change was effective through the end of 1976 and into early 1977.

In February 1977, as construction of Diablo Canyon was thought to be nearing completion, PG&E invited Foley and several non-electrical contractors to bid for finishing up all remaining work on a variety of construction tasks which PG&E referred to generally as "clean-up" work. Foley submitted a low bid and also promised in its bid that, if chosen, it would change its cost-plus 15% fee for Contract 8802 work to a sliding fee starting at 7.5% and moving down to 5%. PG&E awarded the clean-up work to Foley and modified the price terms of Contract 8802 to reflect Foley's proposal. Accordingly, all of the electrical work performed by Foley at Diablo Canyon for the next eight years (1977-1985), amounting to hundreds of millions of dollars, was performed at an average price of about cost-plus 5%.

As set forth earlier, PG&E seeks damages only for the five-year period 1972-1977 during which Foley charged PG&E cost-plus 15%, a rate which PG&E alleges would have been between cost-plus 4% and cost-plus 8% if the bidding had not been rigged in

violation of the Sherman Act or RICO or both. Although not set forth more specifically in any of the pleadings or briefs, this period would presumably be from February 24, 1972, to the date in 1977 when the 15% fee under Contract 8802 was modified to a sliding scale.

II.

A district court's decision to grant judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 is reviewed de novo. *Montiel v. City of Los Angeles*, 2 F.3d 335, 342 (9th Cir. 1993). The standard for reviewing the district court's grant of a directed verdict is de novo. *Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir. 1994); *Zamalloa v. Hart*, 31 F.3d 911, 913 (9th Cir. 1994).

A directed verdict (or judgment as a matter of law) is proper when the evidence permits only one reasonable conclusion. *Berry*, 39 F.3d at 1057. The motion should be granted only if the facts and inferences point so strongly in favor of the moving party that reasonable persons could not arrive at a contrary verdict, *i.e.*, that the jury acted unreasonably in coming to its verdict. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151-52 (9th Cir. 1988). "The evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be drawn in favor of that party." *Id.*

A. *Evidence of a Bid-Rigging Conspiracy*

1. *Relevant Background*

In the district court's Order filed on July 14, 1992, the trial judge lists the then known evidence of bid-rigging among electrical contractors relevant to the Diablo Canyon project.

The judge noted that there was "no real dispute that some of the bidders for the electrical work at Diablo Canyon engaged in

bidding improprieties." However, it was "less clear (1) that PG&E suffered any injury due to these improprieties, and (2) that each Defendant behaved improperly with respect to each contract."

Regarding injury, PG&E contends that the bid-rigging conspiracy proximately caused PG&E to negotiate one-on-one with the winner of Contract 8802, that is, Foley, and to modify that contract to include more work (whatever was left to be done under Contract 8807) at a better rate to Foley than the winning bid should have required if there had been no bid-rigging. PG&E contends further that Foley was thereby enabled to underbid other contractors for non-electrical work by incorporating as part of its bid an offer to reduce the super-competitive payment terms under Contract 8802 to a competitive level.

Regarding the extent of each defendant's liability, PG&E contends that there was a single overarching conspiracy among all defendants to allocate all of the electrical work at Diablo Canyon (and elsewhere in the western United States), rather than a separate conspiracy for each bid. Thus all defendants as co-conspirators would be liable for the totality of PG&E's bid-rigging injury proximately caused by any one or more of the conspirators even though the evidence does not connect each defendant with each rigged bid.

2. *Elements of a Sherman Act § 1 Claim*

Section 1 of the Sherman Act generally proscribes any "contract, combination or conspiracy" that unreasonably restrains the nation's domestic or foreign commerce. 15 U.S.C. §1. As construed by the courts, Section 1 broadly prohibits concerted action that "unreasonably" restrains the nation's domestic or foreign trade. *See, e.g., National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978), and *Standard Oil Co. v. United States*, 221 U.S. 1, 65 (1911).

The coverage of Section 1 of the Sherman Act is necessarily directed at concerted action only. Thus, an actual concert of action between at least two separate persons or entities must first be demonstrated. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

Typically, the existence of a contract, combination or conspiracy must be inferred from circumstantial evidence. Virtually any evidence may be used for this purpose if it indicates that the parties entered into an "understanding" or "agreement" to take joint action. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Merely coincidental behavior that can be explained on legitimate business grounds does not, however, in itself establish a conspiracy if it is equally indicative of a series of unilateral actions. *City of Long Beach v. Standard Oil Co. of Cal.*, 872 F.2d 1401 (9th Cir. 1989), *cert. denied*, 493 U.S. 1076 (1990).

3. *Evidence Presented*

In its Opposition to Defendants' Rule 50(a) Motion re Sherman Act, PG&E offered evidence from which the jury "could infer" that Fischbach had the requisite knowledge, motive, plan and intent to rig large electrical jobs in the Bay Area.

The only "direct evidence" that PG&E has proffered in its brief was the testimony by Mr. Brown, Foley's first Bay Area manager. In his cross examination at trial, Brown stated that, with regard to Contract 8807, "Mr. Hatten told me that [Hatten] controlled all people that was bidding that job." Mr. Hatten was the Bay Area manager for the L.K. Comstock Company, one of Foley's competitors. This is the only evidence of any conspiratorial agreements about which Brown testified he had personal knowledge. Moreover, the district court had stricken that statement as hearsay concerning Hatten's statements.

PG&E provided the following circumstantial evidence that the district court laid out in its June 3, 1994 Order:

> (1) Fischbach, through Francis Kellstrom and Jerome Littman agreed to a "silent joint venture" with Charles Berrell of Foley to rig a job at the Shell Oil refinery in Martinez, California.
>
> (2) William Earl, Fischbach's branch manager, admitted that he probably gave complimentary bids to other electrical contractors.
>
> (3) Fischbach qualified to bid as an electrical subcontractor on a civil contract prior to bidding on contract 8807. PG&E contends that this led to the conspiratorial agreement between Fischbach, Comstock, Lord Electric and Foley. Specifically, PG&E points to Brown's testimony indicating that prior to bidding on contracts 8807 and 8802, the contractors determined that those contracts would go to Comstock.
>
> (4) Brown attended at least one meeting at the Walnut Creek Inn, where representatives from other contractors, including Fischbach, urged him to agree to Comstock's right to be the lowest bidder on all electrical work at Diablo Canyon.
>
> (5) Brown told Comstock what Foley intended to bid for contract 8807. PG&E argued that the jury could infer that Fischbach obtained bid information in advance because the same happened to Lord Electric, another bidder.
>
> (6) Fischbach's bid on contract 8807 was higher than Foley's, which PG&E asserts evidences that Fischbach participated in the conspiracy.

(7) William Earl's admission that he signed the names of Fischbach's president and corporate secretary on the bid for 8807 without obtaining their authorization to do so. PG&E argues that the jury can infer that there was no need for authorization because Earl and even Kellstrom knew that Fischbach's bid was a complimentary bid.

(8) After Foley was declared the winner of contract 8807, but before PG&E solicited bids for contract 8802, Brown met with Charles Berrell in Salt Lake City to discuss a pay-off by Foley to Comstock. At that meeting, Foley promised and Comstock agreed to accept $375,000 in return for which Foley would be the low bidder on 8802. According to PG&E, the jury can infer from this evidence that Comstock controlled the other bidders and that Fischbach was one of them. In PG&E's opinion, it would make no sense for Foley to make a payoff for the outcome on 8807 and 8802 unless there was no risk of competition from Fischbach and Lord Electric, the other contractors who could have bid for the job.

(9) A year after the Salt Lake City meeting, Brown met with Hatten and Albrecht (of Wismer & Becker) and flipped coins for contract 8808. PG&E maintains that the jury can infer from this that Fischbach's and Lord's bid for that contract were known to be losing bids, since that result was predetermined by the coin toss.

(10) Brown did not include any pay-off for Comstock when he prepared Foley's bid for contract 8802, although he did include $250,000 for Wismer & Becker. PG&E asserts that this clearly shows that the promised $375,000 pay-off to Comstock had already been satisfied, by the earlier Washington Metro trade-off. PG&E asserts that this proves there was no threat of competition from Fischbach even before the bids for 8802 were submitted.

(11) The absence of evidence that Fischbach ever made a sales call on PG&E after contract 8802 was awarded to Foley. PG&E insists that such a call is standard practice in a truly competitive market.

(12) In light of evidence that large jobs like Diablo Canyon were rigged at the highest corporate levels, the jury could infer that other executives at Comstock spoke to Fischbach and informed Hatten of the results of those conversations.

The Supreme Court discussed the implications of circumstantial evidence in a case involving allegations of antitrust conspiracy. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1988). The Court stated that the plaintiff must come forward with "sufficiently unambiguous" evidence "'that tends to exclude the possibility'" that the defendants were acting lawfully. *Id.* at 588, *citing Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763-64 (1984).

The question becomes whether, on the evidence presented, the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, "sufficiently unambiguous" evidence that does not have these undesirable deterrent effects. *In re Coordinated Pretrial Proceedings*, 906 F.2d 432, 439 (9th Cir. 1990), *cert. denied* 500 U.S. 959 (1991).

We find that the evidence regarding the meetings amongst the contractors is sufficient to allow a reasonable juror to conclude that Fischbach engaged in "contract, combination or conspiracy" that unreasonably restrains the nation's domestic or foreign commerce, in violation of the Sherman Antitrust Act § 1. We therefore reverse on this issue and remand for further proceedings.

B. *Evidence of RICO Violation*

PG&E also alleges that Fischbach's actions constituted violations of the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et. seq.* ("RICO"). More specifically, PG&E bases its allegations on sections 1962(c) and 1962(d), a substantive RICO claim and RICO conspiracy claim, respectively. Because the elements for the Sherman Antitrust Act violation claim differ from the elements of RICO violations, we next examine the RICO claims separately.

1. *Substantive RICO Claim*

Section 1962(c) makes it unlawful for any person employed by or associated with any enterprise engaged in interstate commerce, to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering activity. PG&E argues that the district court erred when it found that there was inadequate evidence to establish "continuity." For the reasons set forth below, we agree with the district court and affirm.

a. *Enterprise*

The first element in a RICO § 1962(c) action is that there be proof of a RICO "enterprise." "Enterprise" is defined in § 1961(4) of the Act "as any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The statutory definition applies to both civil and criminal RICO actions. The definition of "enterprise" encompasses any type of formal, legal entity and allows RICO plaintiffs considerable scope.

The Supreme Court has defined a RICO enterprise as "a group of persons associated together for a common purpose of engaging in a course of conduct." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Proof of the existence of an enterprise is made "by

evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.*

In *Turkette*, the Supreme Court resolved a split among the circuits by holding that, for RICO purposes, either legitimate or illegitimate associations of individuals united for illicit purposes could constitute an enterprise. 452 U.S. at 584-85. The enterprise must be shown to have an existence separate and distinct from the pattern of racketeering activity engaged in by its members or associates. This distinction is, of course, simple to perceive and to show when a legal entity is alleged as the RICO enterprise. When, as in this case, the alleged enterprise is an "association-in-fact," it is quite often considerably more difficult to show the requisite degree of separateness.

In *River City Markets, Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458 (9th Cir. 1992), the Ninth Circuit followed *Turkette* in finding that "a group of individuals or corporations may together constitute a RICO enterprise even though they do not incorporate or otherwise form a legal entity." 960 F.2d 1458, 1461. While showing the separate existence of the enterprise, a § 1962(c) plaintiff must also prove that a nexus exists between the enterprise and the pattern of racketeering activity. The pattern of racketeering activity is employed as a means of conducting, or participating in, the affairs of the enterprise. Because we find that there was a lack of continuity, PG&E has failed to establish the element of a pattern of racketeering activity. It is this element that we focus on now.

b. *Pattern of Racketeering*

The RICO statute defines a "pattern of racketeering activity" as two or more acts of racketeering, one of which occurred after the passage of the RICO Act and within ten years of the date of the other act of racketeering. 18 U.S.C. § 1961(5). The test for establishing the pattern of racketeering activity is relationship plus

continuity. This flexible, common-sense test is applied on an ad hoc basis.

The relationship prong of the test relates to a showing that the alleged racketeering acts are related to each other in terms of similarity of acts, victims, or methods. The continuity prong relates to the magnitude of the scheme, *i.e.*, the longer a scheme lasts, the more likely it is that continuity will be found. Mostly, the pattern essentially defines the magnitude of the alleged racketeering activity.

In 1989, the Supreme Court expanded on the concept of "continuity plus relationship." In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), the RICO complaint at issue alleged that over a six-year period, the Northwestern Bell Telephone Company had been engaged in a variety of actions to improperly influence telephone rate-making decisions of the Minnesota Public Utilities Commission, causing the Commission to set telephone rates in excess of a fair and reasonable amount. The alleged improprieties included payments of cash to commissioners; offers of future employment; and providing various forms of entertainment. 492 U.S. at 233.

The outer limits of judicial liberality on the pattern of racketeering issue since *H.J.* were demonstrated in *Ikuno v. Yip*, 912 F.2d 306 (9th Cir. 1990). In this RICO action brought by investors against a commodities firm based in Hong Kong, an attorney who had filed two annual reports for the firm sought summary judgment as to himself on the basis that a pattern of racketeering was lacking. This Court, in *Ikuno*, said that there is "no talismanic number" of predicate acts for a pattern but noted that *H.J.* indicated that two predicates could create a pattern in certain circumstances. 912 F.2d at 309. In *Ikuno*, the filing of two allegedly false annual reports by the attorney carried the threat of continuity as the filings would have continued indefinitely but for the fact the commodities firm ceased doing business. *Id.*

Similarly, in *Ticor Title Ins. v. Florida*, 937 F.2d 447 (9th Cir. 1991), the Court affirmed a bench trial judgment in favor of the plaintiffs. In *Ticor*, the predicate offenses were three forgeries of IRS tax lien releases over a 13-year period. As in *Ikuno*, the Court did not focus on a strictly numerical analysis. It found the predicate acts were related to each other by similar purposes and methods of commission and that the threat of continuity was present because the activity was becoming a regular way of doing business by defendants. 937 F.2d at 450-51.

c. *Evidence Provided by PG&E*

The main problem with PG&E's evidence is that it fails to establish the continuity element that is required for the RICO claim. PG&E offered the following evidence at trial:

(1) Fischbach's invitation to Foley to join the group. In support of this contention, PG&E notes Brown's testimony that he travelled with Charles Berrell, his boss, to Salt Lake City in 1965 to meet Jerry Littman, manager of Fischbach's San Francisco office, and Francis Kellstrom, Fischbach's president, regarding the Shell Oil refinery job.

(2) Brown's testimony that Berrell, Matthew Kammenzind of Lord Electric and Hank Dias of Contra Costa Electric urged him to cooperate with the group of Bay Area managers and play by its rules. PG&E notes that this group included Fischbach.

(3) Korman's phone call to Brown asking him if he would "go along" and telling him they could work something out.

(4) Korman's trial testimony that (a) as soon as he arrived in San Francisco, he was invited to a meeting with branch managers from the five national contractors at the Walnut Creek Inn to discuss the allocation of jobs and (b) another meeting with a similar agenda took place in Benecia.

(5) The Brown-Kleinhoff and Brown-Kammenzind phone calls discussing payoffs and cooperating with one another.

(6) Rick Erwin's testimony that the enterprise continued into the late 1970s and possibly into the early 1980s and that he was present when competitors negotiated jobs.

From this evidence, a reasonable juror could not find that Fischbach's alleged acts amounted to or threatened a continuing criminal activity. At most, PG&E has presented circumstantial evidence of suspect conduct that does not amount to a pattern of racketeering in violation of RICO. Upon making a fact-specific inquiry of the record, we find that although the few instances that PG&E allege may be sufficient to allow a reasonable juror to find Sherman Antitrust Act violations, they do not suffice to meet RICO's pattern requirement.

The district court accurately found that PG&E failed to present sufficient evidence to establish a RICO claim.

2. *RICO Conspiracy Claim*

Section 1962(d) makes it unlawful for any person to conspire to violate the provisions of § 1962(a), (b), or (c). This final subdivision of the statute defines activities that violate RICO. The majority rule is that a RICO conspiracy is shown by (1) the existence of an enterprise and (2) the agreement of the defendants to participate in the affairs of the enterprise through the commission of two or more predicate offenses by any co-conspirator. *Baumer v. Pachl*, 8 F.3d 1341 (9th Cir. 1993).

Recently, the Supreme Court provided its interpretation of the § 1962(c) requirement that the defendant "conduct or participate, directly or indirectly, in the conduct of such enterprises's [sic] affairs. . . ." *Reves v. Ernst & Young*, No. 91-886, slip op. at 7 (1993). The *Reves* Court narrowly interpreted the phrase, concluding that for liability to attach "one must participate in the

operation or management of the enterprise itself." *Id.* at 8-9. "RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required." *Id.* at 9.

The heart of the RICO conspiracy claim is the agreement. Where there is such an agreement, a RICO conspiracy may exist even if the underlying RICO violations of § 1962(a), (b) or (c) were not carried out.

Although PG&E has stated the existence of such an agreement, it did not present any evidence that Fischbach or any of its employees agreed to commit a pattern of predicate offenses or that they agreed that the pattern of predicate offenses would be the means by which the conspirators would participate in the operation or management of the enterprise. Thus, we affirm on the RICO conspiracy claim.

C. *Proof of Cost of Capital Damages*

Although the outcome of this issue might have been different had we reversed on the RICO claims, we find that the district court erred in excluding the cost of capital damages evidence. We therefore reverse on this issue.

The district court previously granted PG&E's summary judgment motion, finding that "cost of capital" damages were recoverable. The court stated that

> . . . PG&E seeks to recover not only the excess fees it incurred because of the overarching conspiracy to rig the bids for electrical work on the Diablo Canyon Nuclear Power Plant, but also the excess *finance* charges engendered by the excess fees it paid.

In its Order Denying Defendants' Motion for Reconsideration of this Court's Order of July 27, 1993 Granting PG&E's Motion for

Summary Judgment as to Cost of Capital Damages, the district court clarified that,

> [c]ost of capital is an out-of-pocket expense. Prejudgment interest is not. The latter accrues during the pendency of an action. The former flows directly from conduct upon which the action is based. PG&E's claim for cost of capital damages arises from Defendants' allegedly wrongful conduct, not from the fact that its recovery has been delayed by the pendency of this action.

The district court also stated that "if PG&E financed only 75 percent of the entire project, it can recover finance charges only on 75 percent of the overcharges it incurred on Contract 8802." *Id.* at 6.

The district court later found that it would not allow recovery on any *equity* financing cost-of-capital damages, stating that the law only supported the recovery of debt financing costs. Since PG&E failed to prove what portion of the total construction cost was financed using debt, equity or retained earnings, the district court found that PG&E did not produce sufficient evidence for a reasonable jury to conclude the specific amount of excess finance costs it incurred on borrowed funds.

PG&E argues that it should have been given more latitude in proving the extent of damages caused by Fischbach's alleged conspiracy. It cites principally to *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 1992 U.S. Dist. LEXIS 7721 (N.D.N.Y. 1992), for the proposition that equity and debt financing are identical costs. It is true that this case allowed the plaintiff to present evidence of financing costs as part of the damages arising from the defendant's alleged tortious conduct. 1992 U.S. Dist. LEXIS 7721 at *107. The *Niagara* court stated that all that is required is that a plaintiff's proof of financing costs damages be "commercially reasonable and foreseeable under the

circumstances." *Id.* at *117, *citing LILCO*, 1990 U.S. Dist. LEXIS 5351 at *16.

In a footnote that PG&E highlights, the *Niagara* court indicated that plaintiff's chief financial officer was going to testify that plaintiff raised money to pay for the costs by selling preferred stock and common stock, issuing long-term and short-term securities and making substantial borrowing, and incurred a finance cost on each source. *Id.* at *116 n.72. Again, this does not establish that the *Niagara* court really considered the equity versus debt issue.

In considering this issue, the distinction between financing costs through debt as opposed to equity is illogical. If a plaintiff actually established a conspiracy, then the plaintiff should recover finance costs, regardless of where the plaintiff got the funds.

As with the recoverability of other types of damages, the amount is a question of fact. But the damages must be reasonably certain and traceable to the breach, not remote or the result of other intervening causes. PG&E may have met this requirement if a conspiracy is indeed established.

Based on the foregoing, we find that the district court should not have excluded the evidence on this issue. For the foregoing reasons, we REVERSE and remand for further proceedings on both the Sherman Antitrust claim and the damages issue, and AFFIRM on the RICO claims.

APPENDIX

Decisions of the District Court for the Northern District of California

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 85-2922 SW

June 3, 1994

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff,

--v.--

HOWARD P. FOLEY CO., INC.; HOWARD FOLEY ENTERPRISES, INC.; WISMER AND BECKER CONTRACTING ENGINEERS, INC.; COMSTOCK GROUP, INC., L.K. COMSTOCK & COMPANY, INC.; CONSOLIDATED COMSTOCK CO, INC.; FISCHBACH & MOORE, INC.; FISCHBACH CORP.; LORD ELECTRIC CO., INC.; BANCROFT FOLEY; CHARLES BERRELL; ROBERT ALBRECHT; PAUL HATTEN; CHARLES SCHARFE; FRANCIS KELLSTROM; MATTHEW KAMMENZIND; and JAMES KORMAN,

Defendants.

ORDER GRANTING FISCHBACH & MOORE'S MOTION FOR JUDGMENT AS A MATTER OF LAW AND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW; DENYING PG&E'S MOTION FOR SANCTIONS; SETTING SCHEDULE FOR BRIEFING AS TO THE DISPOSITION OF BANCROFT FOLEY

After PG&E rested its case, Defendants moved for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a). Defendants filed a motion for renewed judgment as a matter of law pursuant to Fed.R.Civ.P. 50(b) after resting their case. Prior to oral argument

on these motions, James Korman and Francis Kellstrom advised the Court that a settlement was pending and they requested that their motions be taken off the calendar. Korman and Kellstrom have since finalized a settlement with PG&E and PG&E has dismissed its claims against them. For the reasons expressed below, Fischbach & Moore's motion for judgment as a matter of law and renewed motion for judgment as a matter of law are GRANTED. In addition, PG&E's motion for sanctions is DENIED.

I. DEFENDANT FISCHBACH & MOORE'S MOTIONS AND RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW

A. Legal Standard

A district court has the authority under Fed.R.Civ.P. 50 to enter judgment as a matter of law. It can only do so, however, where the evidence is such that without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one reasonable conclusion as to the verdict. *Walker v. KFC Corp.*, 728 F. 2d 1215, 1223 (9th Cir. 1984) . When evaluating the motion, the court must view the evidence in the light most favorable to the nonmoving party to decide whether substantial evidence exists to support a finding for the nonmoving party. *Shakey's Inc. v. Covalt*, 704 F.2d 426, 430 (9th Cir. 1983).

B. PG&E's Claims under § 1 of the Sherman Act

According to Fischbach, the evidence was insufficient to establish that it combined or conspired to restrain trade in the bidding or performance of electrical construction contracts 8807, 8808 or 8802, or in the conversion of contract 8802 to cost-plus. Fischbach's attack is two-pronged. First, it argues that PG&E presented no witnesses who had personal knowledge of any bid rigging at Diablo Canyon. In this regard, Fischbach contends that

William Brown's testimony as to what Paul Hatten said to him about the other contractors should be stricken as hearsay and not admissible under the co-conspirator exception to the hearsay rule, Fed.R.Evid. 801(d)(2)(E), because PG&E failed to make a prima facie case that Fischbach was ever a party to a Diablo Canyon conspiracy. Second, Fischbach argues that even if Brown's testimony is admissible, Plaintiff's case against them is based solely upon speculation.

1. Testimonial Evidence of Charles Berrell, Paul Hatten and William Brown.

Neither Charles Berrell nor Paul Hatten testified that Fischbach was involved in bid rigging at Diablo Canyon. Berrell testified that he did not remember Fischbach being on the bidders list for contract 8807. R.T. 815. Paul Hatten testified that he never talked to anybody from Fischbach about contracts 8802 and 8807. R.T. 927. That leaves William Brown.

Brown's testimony as to Fischbach's involvement in bid rigging at Diablo Canyon is inadmissible because it is based on statements made by others and PG&E failed to lay the evidentiary groundwork for its admission. Rule 801(d)(2)(E) of the Federal Rules of Evidence provides

> A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Before statements may be admitted under this rule, the party seeking to admit them must demonstrate to the court by a preponderance of the evidence (1) the existence of a conspiracy and (2) the non-offering party's participation in the conspiracy. *E.W. French & Sons, Inc. v. General Portland Inc.*, 885 F.2d 1392, 1397 (9th Cir. 1989) (*citing Bourjaily v. United States*, 483 U.S. 171, 181, 107 S.Ct. 2775, 2782, 97 L.Ed.2d 144 (1987)).

make this determination the court must weigh the credibility and reliability of the witnesses providing such testimony. *Bourjaily*, 483 U.S. at 180-181, 107 S.Ct. at 2781; *Precision Piping v. E.I. du Pont de Nemours and Co.*, 951 F.2d 613, 621 (4th Cir. 1991).

Brown's testimony is insufficient to establish Fischbach's participation in a conspiracy because he was not a believable witness. The timing of his initial disclosures about Fischbach, inconsistencies in those disclosures and inconsistencies in his testimony with the sworn testimony of others all render his testimony unreliable. In light of this determination, Brown's hearsay testimony concerning Paul Hatten's statements must be and is hereby STRICKEN.

With Brown's testimony stricken, there is no evidence from which a reasonable jury could conclude that Fischbach was involved in a bid rigging conspiracy at Diablo Canyon.

2. The Remaining Evidence

The remaining evidence as to Fischbach's participation in the Diablo Canyon conspiracy is entirely circumstantial. In such cases, the court must determine "whether a reasonable jury 'could reach the suggested conclusion on the basis of the hard evidence without resorting to guesswork or conjecture.'" *The Jeanery, Inc. v. James Jeans Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988) (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco Inc.*, 637 F.2d 105, 116 (3rd Cir. 1980), *cert denied*, 451 U.S. 911 (1981)). In this case, a reasonable jury could not.

PG&E's evidentiary mosaic consists of the following:

> (1) Fischbach, through Francis Kellstrom and Jerome Littman agreed to a "silent joint venture" with Charles Berrell of the Foley Company to rig a job at the Shell Oil refinery in Martinez, California. PG&E contends that a reasonable jury could infer from this evidence that

Fischbach had the requisite knowledge, motive, plan and intent to rig large electrical jobs in the Bay Area and that transactions of this sort take place in the upper echelons of the corporate hierarchy. PG&E also argues that this evidence suggests that Fischbach and Foley had a close relationship for the purposes of conspiring the [sic] rig bids for other work in the Bay Area.

(2) William Earl, Fischbach's branch manager, admitted that he probably gave complementary bids to other electrical contractors. PG&E maintains that this permits the jury to infer that Fischbach and Earl were knowledgeable about bid rigging practices.

(3) Fischbach qualified to bid as an electrical subcontractor on a civil contract prior to bidding on contract 8807. PG&E contends that this work led to the conspiratorial agreement between Fischbach, Comstock, Lord Electric and Foley. In this regard, PG&E points to Brown's testimony indicating that prior to bidding on contracts 8807 and 8802, the contractors determined that those contracts would go to Comstock.

(4) Brown attended at least one meeting at the Walnut Creek Inn, where representatives from other contractors, including Fischbach, urged him to agree to Comstock's right to be the lowest bidder on all electrical work at Diablo Canyon.

(5) Brown told Comstock what Foley intended to bid for contract 8807. PG&E argues that the jury can infer from this evidence that Fischbach obtained bid information in advance because that's what happened to Lord Electric, another bidder.

(6) Fischbach's bid on contract 8807 was higher than Foley's, which PG&E contends would be the case if Fischbach participated in the conspiracy.

(7) William Earl's admission that he signed the names of Fischbach's president and corporate secretary on the bid for 8807 without obtaining their authorization to do so. PG&E argues that the jury can infer from this fact that there was no need for him to do so because Earl and perhaps Kellstrom knew that Fischbach's bid was a complementary bid.

(8) After Foley was declared the winner of contract 8807, but before PG&E solicited bids for contract 8802, Brown met with Charles Berrell in Salt Lake City to discuss a pay-off by Foley to Comstock. At the meeting, Foley promised and Comstock agreed to accept $375,000 in return for which Foley would be the low bidder on 8802. According to PG&E, the jury can infer from this evidence that Comstock controlled the other bidders and that Fischbach was one of them. In PG&E's eyes, it would make no sense for Foley to make a payoff for the outcome on 8807 and 8802 unless there was no risk of competition from Fischbach and Lord Electric, the other contractors who could have bid for the job.

(9) A year after the Salt Lake City meeting, Brown met with Hatten and Albrecht (of Wismer & Becker) and flipped coins for contract 8808. PG&E maintains that the jury can infer from this that Fischbach's and Lord's bid for that contract were known to be losing bids, since that result was predetermined by the coin-toss.

(10) Brown did not include any pay-off for Comstock when he prepared Foley's bid for contract 8802, although he did include a $250,000 for Wismer & Becker. According to PG&E, it is clear that the promised $375,000 pay-off to

Comstock had already been satisfied, by the earlier Washington Metro trade-off. PG&E contends that the jury can infer from this evidence that there was no threat of competition from Fischbach even before the bids for 8802 were submitted.

(11) The absence of evidence that Fischbach ever made a sales call on PG&E after contract 8802 was awarded to Foley. PG&E insists that such a call is standard practice in a truly competitive market. PG&E maintains that the jury can infer from this that Fischbach was part of the conspiracy, particularly since Korman admitted that he met with Foley and other contractors to discuss who was bidding what work.

(12) In light of evidence that large jobs like Diablo Canyon were rigged at the highest corporate levels, the jury can infer that other executives at Comstock spoke to Fischbach and informed Hatten of the results of those conversations.

Although evidence of Fischbach's other acts is admissible to show opportunity, motive, plan, knowledge and intent, a jury cannot use such evidence to infer that Defendants did the same thing here. Fed. R. Evid. 404(b). Of the 12 tiles in PG&E's evidentiary mosaic, four constitute "other act" evidence: its references to the Shell Oil Refinery job in Martinez (#l), and to complementary bids given by William Earl to other contractors (#2), and to Fischbach doing whatever Lord Electric did (#5), and to large jobs being rigged at the highest corporate levels (#12). All of this evidence is legally irrelevant.

Even if the "other acts" evidence is considered along with the other eight pieces, it is still legally insufficient to establish Fischbach's participation in the Diablo Canyon conspiracy. Although Brown testified that someone from Fischbach was present at the Walnut Creek Inn, that meeting concerned an agreement to leave Comstock on the Diablo Canyon jobsite. However, that

agreement never went into effect since Foley won contract 8807. The facts surrounding Fischbach's behavior with regard to contract 8802 - that its bid was higher than the winner's, that Earl signed the bid without approval and that Fischbach made no sales calls - also fail to provide a reasonable basis upon which to conclude that Fischbach was involved. Furthermore, there is no evidence in the record that anyone rigged contract 8831, and Paul Hatten testified that that contract was not rigged. Thus, the jury cannot permissibly infer that Fischbach was involved based on that behavior. PG&E's argument that Foley would not have paid off Comstock for contract 8802 without knowing that Fischbach would go along (#8) is similarly speculative. The "coin-toss" argument (#9) is belied by Brown's testimony that at Silverado he believed that he, Albrecht and Hatten were the only bidders for contract 8808. That Foley may have paid off Comstock with the WMATA job prior to bidding on contract 8802 proves nothing at all about Fischbach.

The foregoing analysis leads to but one conclusion: a reasonable jury could not find in PG&E's favor on the Sherman Act claim without making an impermissible leap of faith. Therefore, Fischbach's motion for judgment as a matter of law and renewed motion for judgment as a matter of law are GRANTED.

C. PG&E's RICO Claims

Fischbach also argues that the evidence is insufficient to permit a reasonable jury to find for PG&E on its RICO claims.

1. The Substantive RICO Claim

To succeed on its substantive RICO claim, PG&E must prove (1) the conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. 18 U.S.C. § 1962(c). According to PG&E, it offered evidence demonstrating that Fischbach participated in an enterprise consisting of managers of Bay Area electrical

construction companies whose common purpose was to allocate jobs in Northern California.

A RICO enterprise must have a common purpose and an ongoing organization and structure. *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981); *United States v. Feldman*, 853 F.2d 648, 657 (9th Cir. 1988), *cert. denied*, 489 U.S. 1030 (1989). In this regard, PG&E offers the following evidence:

(1) Fischbach's invitation to Foley to join the group. In support of this contention, PG&E notes Brown's testimony that he travelled with Charles Berrell, his boss, to Salt Lake City in 1965 to meet Jerry Littman, manager of Fischbach's San Francisco office, and Francis Kellstrom, Fischbach's president, regarding the Shell Oil refinery job.

(2) Brown's testimony that Berrell, Matthew Kammenzind of Lord Electric and Hank Dias of Contra Costa Electric urged him to cooperate with the group of Bay Area managers and play by its rules. PG&E notes that this group included Fischbach.

(3) Korman's phone call to Brown asking him if he would "go along" and telling him they could work something out.

(4) Korman's trial testimony that (a) as soon as he arrived in San Francisco, he was invited to a meeting with branch managers from the five national contractors at the Walnut Creek Inn to discuss the allocation of jobs and (b) another meeting with a similar agenda took place in Benecia.

(5) The Brown-Kleinhoff and Brown-Kammenzind phone calls discussing payoffs and cooperating with one another.

(6) Rick Erwin's testimony that the enterprise continued into the late 1970's and possibly into the early 1980's and that he was present when competitors negotiated jobs.

This evidence is insufficient to establish the existence of an enterprise having the requisite continuity for a successful RICO claim. PG&E's evidence indicates that less than 20 bids were rigged out of the hundreds of jobs that were bid during the existence of the conspiracy. Although there is no case authority holding that a successful RICO claimant must demonstrate a threshold level of bid rigging activity, no reasonable jury could conclude on the basis of this scant and intermittent activity that an enterprise existed.

PG&E also failed to produce legally sufficient evidence from which a reasonable jury could find a RICO enterprise with the requisite structure. A RICO enterprise "must be more than a group of people who get together to commit a 'pattern of racketeering activity,'" *United States v. Neapolitan*, 791 F. 2d 489, 500 (7th Cir. 1986), *cert. denied*, 479 U.S. 939, 940 (1986), it must have an organizational structure or system of authority for making and implementing decisions and for exercising common control over its members. *Feldman*, 853 F.2d at 659; *United States v. Riccobene*, 709 F.2d 214, 222 (3rd Cir. 1983), *cert. denied*, 464 U.S. 849 (1983). In addition, the organization and structure of the alleged enterprise must exist as an entity separate and apart from whatever pattern of conspiratorial racketeering activity is proved. *Turkette*, 452 U.S. at 583, 101 S.Ct. at 2528; *United Energy Owners Committee, Inc. v. United States Energy Management Systems, Inc.*, 837 F.2d 356, 362 (9th Cir. 1988).

PG&E's definition of the RICO enterprise it alleges has been somewhat fluid. In its Third Amended Complaint and in this motion, PG&E argues that the enterprise was directed from the penthouses of the corporations alleged to be involved. Specifically, PG&E contends that this "penthouse group" consisted of Bancroft Foley, Charles Bertell (executive vice president of

Foley), James Scharfe (president of Comstock), and Francis Kellstrom, who conducted the activities of the enterprise by ordering their subordinates to engage in bid rigging activity. However, on summary judgment and at trial, PG&E alleged that the association consisted of the Bay Area branch managers group and that the members of the penthouse group were not part of the enterprise. PG&E Summary Judgment Memo., 154-155, filed November 28, 1990; PG&E Summary Judgment Reply Memo., 199, Filed January 21, 1992; R.T. 3539. Having staked out this position, the Court cannot allow PG&E to return to its original theory, particularly since the Court relied on PG&E's Bay Area managers group claim when it rendered its decision on the parties' motions for summary judgment. Order of July 14, 1992, at 48. Without the membership of the penthouse group, the association lacks the requisite hierarchical and organization structure to constitute a RICO enterprise.

PG&E's failure to present evidence sufficient to establish a RICO enterprise with the requisite continuity and structure is fatal to its substantive RICO claim. Therefore, Fischbach's motion for judgment as a matter of law and renewed motion for judgment as a matter of law on PG&E's RICO claim under 18 U.S.C. § 1962(c) are GRANTED.

2. PG&E's RICO Conspiracy Claim

PG&E did not offer evidence sufficient to prove its RICO conspiracy claim. To prove its conspiracy claim against Fischbach under 18 U.S. C. § 1962 (d), PG&E must show that the company (1) agreed to commit a pattern of predicate offenses and (2) agreed that the pattern of predicate offenses would be the means by which the conspirators would participate in the operation or management of the enterprise. *Reves v. Ernst & Young*, 113 S.Ct. 1163, 1172-1173 (1993); *Baumer v. Pachl*, 8 F.3d 1341, 1346 (9th Cir. 1993); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir. 1984), *cert. denied*, 469 U.S. 845 (1984). PG&E failed to produce any

evidence that Fischbach or any of its employees made either of these two agreements.

In response to Fischbach's motion, PG&E argues that Korman's testimony demonstrates that he agreed to participate in the enterprise to allocate jobs and knew that members of the enterprise would use the telephone and mails to engage in bid rigging. According to PG&E, Kellstrom demonstrated his agreement by joining Littman in rigging the Shell Oil job in 1965. However, this evidence demonstrates only sporadic bid rigging, not unlawful activity guided by a predetermined plan. It is far from sufficient to establish that any Fischbach employee agreed to commit the requisite pattern of predicate offenses or that any Fischbach employee agreed to participate in the operation or management of the enterprise via the predicate offenses.

Therefore, Fischbach's motion for judgment as a matter of law and renewed motion for judgment as a matter of law as to PG&E's RICO conspiracy claim under 18 U.S.C. § 1962(d) are GRANTED.

D. PG&E's Claim for Cost of Capital Damages

Finally, Fischbach moves for judgment as a matter of law against PG&E on its claim for cost of capital damages. Fischbach's motion is made on the ground that PG&E failed to produce legally sufficient evidence for a reasonable jury to find the amount of money that PG&E actually borrowed from, or incurred as debt to, outside lenders for the construction of Diablo Canyon.

Fischbach is correct. Before trial, this Court held that under *Minpeco, S.A. v. Hunt*, 686 F.Supp. 420 (S.D.N.Y. 1988) (*Minpeco I*) and *Minpeco, S.A. v. Hunt*, 718 F.Supp. 168 (S.D.N.Y. 1978) (*Minpeco II*), PG&E was entitled to recover the actual costs it incurred on funds it borrowed for the purpose of constructing Diablo Canyon. Order of July 27, 1993, at 11; Order of September 13, 1993, at 6. The Court further ruled that it was

PG&E's burden to prove the specific amount of excess finance costs it incurred on such borrowed funds. Order of September 13, 1993, at 6. At trial, PG&E failed to prove what portion of the total construction cost was financed using debt, what portion was financed using equity or what portion was financed using retained earnings.

PG&E offers two arguments in opposition to Fischbach's motion: the "consistency" argument and the "sufficiency" argument. Both arguments stem from the premise that Avram Tucker, PG&E's accountant, testified that the utility financed 100% of its Diablo Canyon construction costs.

PG&E's "consistency" argument is that its claim for 100% of its financing costs is consistent with (1) *Minpeco II*, (2) federal and state regulations mandating that PG&E's rates include the cost of equity financing, and (3) this Court's rulings on the subject. However, *Minpeco II* does not stand for the proposition PG&E asserts. Rather, *Minpeco II* concerns a setoff against the amount of the actual antitrust damages at issue. The fact that regulations require PG&E's rates to include its equity costs is irrelevant. The costs of equity financing, use of retained earnings or anything else that is akin to a claim for lost opportunity costs is not recoverable. The reason is that these costs are equivalent to prejudgment interest, which is included in the treble damage provisions of the anti-trust and RICO statutes. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 561-562 (7th Cir. 1986) (Clayton Act); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 811 (E.D. La. 1986) (RICO). Finally, since the issue arose, the Court has consistently ruled, with the exception of one misstatement on November 19, 1993, which was corrected the following day, that PG&E would be required to recover only its out of pocket borrowing costs. Tucker was questioned twice about this issue, during cross-examination and by the Court, but he could not pinpoint the portion PG&E financed through borrowing:

Q. Well, did they get [the money used to finance the project] either from a bank or from a bond or from a short term note? That is, did they borrow it from a third party as opposed to get the money from issuance of capital stock or preferred stock or from operations?

A. Okay. No. Some of it came from preferred stock and common stock which was from third parties.

Some of it was from retained earnings which would be money that they had previously gotten through revenues. R.T. 2081 - 2082.

* * *

THE COURT: I have a couple of questions. We're talking about the source of funds for construction of the Diablo Canyon. You said it was fully financed, correct?

THE WITNESS: In my opinion, that's correct, sir.

THE COURT: And then you said source of bonds and some stock and some other revenue or something. What was the third category?

THE WITNESS: Retained earnings.

THE COURT: Pardon me?

THE WITNESS: Retained earnings.

THE COURT: You didn't put a percentage on any of those, did you, how much each was allocated for?

THE WITNESS: That's correct.

R.T. 2117.

PG&E notes that Tucker offered two alternative methods for calculating PG&E's cost of capital damages, one of which was based on its short-term borrowing costs. Because PG&E never established how much it borrowed for the project, that method is inapplicable.

PG&E's "sufficiency" argument is that Tucker's opinion was sufficient to establish its cost of capital damages and by doing so, the burden shifted to Fischbach to rebut it. However, Tucker never claimed that PG&E paid the alleged overcharges by incurring debt, which, as explained above, PG&E was required to prove. Instead, he claimed that a combination of debt and equity was used to pay the overcharges.

Based on the foregoing, Fischbach's motion for judgment as a matter of law and renewed motion for judgment as a matter of law on PG&E's claim for cost of capital damages is GRANTED.

Having granted Fischbach's motion for judgment as a matter of law and renewed motion for judgment as a matter of law on all claims and there being no just reason for delay, the Court will enter judgment in favor of Fischbach and Moore forthwith, pursuant to Fed. R. Civ. P. 54(b).

II. PG&E'S MOTION FOR RULE 11 SANCTIONS

PG&E moves for sanctions against counsel for Fischbach & Moore for attempting to mislead the court by misrepresenting the record and for failing to comply with the Court's orders. In support of its motion, PG&E claims there are five instances of misbehavior.

First, PG&E argues that Fischbach's counsel should be sanctioned for altering and misrepresenting David Pike's deposition testimony in support of its motion for reconsideration of this Court's Order of July 27, 1993. Pike testified:

> Q. Do you know whether PGandE borrowed money to finance Diablo Canyon?
>
> A. I listened to -- oh, yes, they borrowed money to finance Diablo Canyon, certainly.

Pike Dep., p. 525. Fischbach's counsel quoted the passage as follows:

> Q. Do you know [from admissible evidence] whether PGandE borrowed [any] money to finance [something somehow related to] Diablo Canyon?
>
> A. I listened to [Tucker] -- oh, yes, [I assume] they borrowed [some] money to finance [something related to] Diablo Canyon, certainly.

Defs' Memo. of Points and Auths. in Support of their Motion for Reconsid. at 21. According to PG&E, this alteration was not well grounded in fact and was made to obfuscate the issues and mislead the Court.

In response, Fischbach's counsel argues that the bracketed material was included out of a concern that in rendering its decision on PG&E's motion for summary judgment, the Court had not drawn all inferences from the underlying facts in the light most favorable to the nonmoving party, as it was required to do.

Until this motion was filed, Fischbach's counsel did not cite anything to support its interpretation of Pike's testimony. There was no declaration from Pike stating how he interpreted the question or what he meant by his answer. Therefore, the Court appropriately concluded that

> Pike's statement is unequivocal and unambiguous. The only reasonable inference the Court should have drawn and did draw from the statement is that Pike believed that

> PG&E borrowed money to finance the Diablo Canyon project.

Order of September 13, 1993, at 5.

Because the "context material" was included in brackets, indicating that it was not part of the original quotation, the Court cannot conclude that Fischbach's counsel intended it as a means of deceiving the Court about Pike's testimony. Rather, it was merely attempting to convey its own interpretation, albeit unsupported, of what he said. To minimize confusion about what their intentions were, Fischbach's counsel should have provided prefatory remarks. Although their failure to do so caused some confusion, this conduct does not warrant sanctions.

Second, PG&E claims that Fischbach's counsel attempted to mislead the Court by falsely asserting in its motion for reconsideration that PG&E's failure to notify Defendants until late in 1992 that PG&E was seeking cost of capital damages seriously prejudiced their client because it precluded Fischbach from taking discovery from percipient witnesses. PG&E also notes that on November 13, 1992, Fischbach asked for five months to conduct damage discovery and the Court gave Defendants six. According to PG&E, nothing precluded Defendants from deposing percipient witnesses during this six month period.

In response, Fischbach's counsel continues to assert that its client was prejudiced by the timing of PG&E's notice in that it was unable to develop a complete factual record on the issue of the foreseeability of PG&E's cost of capital damages. Fischbach's counsel also claims that the Court improperly assumed foreseeability in granting PG&E's motion for summary judgment on PG&E's claim for cost of capital damages.

In its Order of September 13, 1993, this Court rejected Defendants' arguments, finding that

> Nothing precluded Defendants from conducting discovery on this issue and they raised no objection while damage discovery was open. Furthermore, they offered no evidence whatsoever to support their argument that they were prejudiced by PG&E's action.

Id. at 2. Although the Court rejected Defendants' prejudice argument, the Court cannot conclude that its counsel raised it with improper intentions. Therefore, the Court will not impose sanctions on this ground.

Third, PG&E argues that Fischbach's counsel should be sanctioned for objecting to exhibits designated by PG&E which Fischbach had designated itself earlier. In PG&E's opinion, this action made a mockery of this Court's evidence designation process.

PG&E raised this issue in a motion in limine. As to that motion, the Court decided that coinciding designations were not the equivalent of a stipulation. Therefore, Fischbach's counsel did not violate Rule 11 by objecting to evidence which it had previously designated.

Fourth, PG&E contends that Fischbach's counsel should be sanctioned for objecting to the introduction of any evidence about the bid rigging of any project other than Diablo Canyon and a certain contract at WMATA. According to PG&E, Fischbach's counsel made these objections ignoring (1) PG&E's RICO case, in which PG&E claims it will establish that the Branch Manager's Group illegally allocated electrical contract work elsewhere in Northern California, and (2) this Court's Order of July 14, 1992, which set forth some of the non-Diablo Canyon, non-WMATA bid rigging that PG&E would use to establish its RICO case. PG&E claims this evidence is indisputably relevant and the objections of Fischbach's counsel are frivolous.

In response, Fischbach's counsel notes that in its Order of July 14, 1992, this Court found that PG&E's evidence regarding Fischbach's participation in the affairs of the alleged RICO enterprise was "noticeably weak," Order of July 14, 1992, at 53, and that "there is almost no evidence linking Fischbach to the bidding on Contract 8802, the only contract for which there is evidence of injury." *Id.* at 55. Fischbach's counsel contends that these findings, combined with the theory that PG&E's RICO claim should have been dismissed as duplicative of the Sherman Act claim, made it appropriate for them to argue that the limited amount of non-Diablo Canyon evidence which PG&E was planning to offer in support of its RICO claim was legally irrelevant with respect to all of the remaining defendants.

In this Court's Order of July 14, 1992, the Court held

> [T]he RICO enterprise and the bid-rigging conspiracy are not the same. RICO requires that the RICO enterprise be ongoing and continuous over time. For this reason, PG&E offers evidence that the alleged RICO enterprise encompassed more than just the bidding for electrical work at Diablo Canyon.

Id. at 49.

After discussing some of PG&E's evidence on these issues, the Court stated

> Defendants offer no evidence to rebut the testimony of these witnesses that the branch managers of the largest electrical contractors routinely rigged the bidding on electrical work over the course of several years. . . . The jury shall determine whether the Branch Managers Group had sufficient organizational structure and continuity over time to qualify as a RICO enterprise.

Id. at 50.

Given these earlier conclusions, at least some of the non-Diablo Canyon evidence was relevant to PG&E's RICO claim, in particular, the evidence that defendants rigged bids on other Northern California projects. Thus, Fischbach's motion was inappropriate. Although inappropriate, this conduct was not sufficiently flagrant to warrant sanctions.

Finally, PG&E argues that Fischbach's counsel should be sanctioned for repeatedly flouting this Court's orders restricting the deposition testimony of David Pike. Specifically, PG&E contends that Fischbach's counsel (1) allowed Pike to resurrect language and theories in his supplemental report which the Court had stricken from his first report and (2) continued to have Pike testify on liability issues even though the Court barred him from doing so.

In response, Fischbach's counsel argues that defense counsel told Pike that he could testify only as to damages, which Pike confirmed at his deposition. Pike Dep. at 578, 581, 585-86, 588. They also note that some facts may bear on liability and damages and it would not have been proper for the Court to bar Pike from using facts it may have stricken from his report to testify about damages. Finally, they argue that most of the allegedly offending material is no longer part of the supplemental report.

Fischbach's counsel's behavior as to Pike's reports did not violate Rule 11. Pike's offending deposition testimony does not appear to have been made with the intent of evading this Court's orders. In addition, although Pike resurrected stricken material in his supplemental report, it is limited to one paragraph. This conduct is below the threshold for imposing sanctions under Rule 11.

None of these instances constituted a violation of Rule 11. Accordingly, PG&E's motion for sanctions is DENIED.

This Court's decision to deny PG&E's motion for sanctions should not be construed as an endorsement of the way Fischbach's

counsel conducted themselves prior to trial. On several occasions, their behavior was childish, undignified and unprofessional. Although this behavior never rose to the level warranting the imposition of sanctions, it is sufficient to warrant an admonishment that Fischbach's counsel must conduct themselves with the utmost decorum if they find themselves before this Court in the future.

III. THE DISPOSITION OF BANCROFT FOLEY

On November 9, 1993, this Court entered an Order for entry of default against defendant Bancroft T. Foley, Jr. in default. No judgment has been entered. Accordingly, PG&E shall, by June 17, 1994, file a motion regarding the disposition of its claims against Bancroft T. Foley, Jr. Should Bancroft T. Foley, Jr. desire to file an opposition, he must do so by July 1, 1994. PG&E's reply, if any, shall be filed by July 8, 1994. The motion will then stand submitted without oral argument.

CONCLUSION

In light of the foregoing, the Court ORDERS as follows:

(1) Fischbach & Moore's motion for judgment as a matter of law and renewed motion for judgment as a matter of law on PG&E's claim under section 1 of the Sherman Act are GRANTED.

(2) Fischbach & Moore's motion for judgment as a matter of law and renewed motion for judgment as a matter of law on PG&E's claim under 18 U.S.C. § 1962(c) is GRANTED.

(3) Fischbach & Moore's motion for judgment as a matter of law and renewed motion for judgment as a matter of law on PG&E's claim under 18 U.S.C. § 1962(d) is GRANTED.

(4) Fischbach & Moore's motion for judgment as a matter of law and renewed motion for judgment as a matter of law on PG&E's claim for cost of capital damages is GRANTED.

(5) PG&E's motion for sanctions is DENIED.

(6) PG&E shall file a motion as to the disposition of its claims against Bancroft Foley by June 17, 1994. Bancroft Foley's opposition is due on July 1, 1994. PG&E's reply, if any, shall by filed by July 8, 1994.

IT IS SO ORDERED.

DATED: San Jose, California
June 3, 1994

/s/ Spencer Williams
Spencer Williams
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 85-2922 SW

July 27, 1993

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff,

--v.--

HOWARD P. FOLEY CO., INC.; HOWARD FOLEY ENTERPRISES, INC.; WISMER AND BECKER CONTRACTING ENGINEERS, INC.; COMSTOCK GROUP, INC., L.K. COMSTOCK & COMPANY, INC.; CONSOLIDATED COMSTOCK CO., INC.; FISCHBACH & MOORE, INC.; FISCHBACH CORP.; LORD ELECTRIC CO., INC.; BANCROFT FOLEY; CHARLES BERRELL; ROBERT ALBRECHT; PAUL HATTEN; CHARLES SCHARFE; FRANCIS KELLSTROM; MATTHEW KAMMENZIND; and JAMES KORMAN,

Defendants.

ORDER DENYING CERTAIN DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON PG&E'S CLAIM FOR COST OF CAPITAL DAMAGES; DENYING CERTAIN DEFENDANTS' MOTION TO DISQUALIFY AVRAM TUCKER; DENYING CERTAIN DEFENDANTS' MOTIONS TO DISQUALIFY ROBERT HARRIS; GRANTING IN PART PG&E'S MOTION FOR PARTIAL SUMMARY JUDGMENT FOR COST OF CAPITAL DAMAGES; GRANTING PG&E'S MOTION FOR THE ISSUANCE OF SUBPOENAS PURSUANT TO 18 U.S.C. § 1965(c)

Pursuant to this Court's Scheduling Conference Order, the parties have brought the final round of pretrial motions in this case. Defendants Fischbach & Moore, Francis Kellstrom and James Korman move for partial summary judgment on PG&E's claim for cost of capital damages and move to disqualify PG&E's experts, Avram Tucker and Dr. Robert Harris. PG&E cross-moves for partial summary judgment on its claim for cost of capital damages and moves for the issuance of subpoenas pursuant to 18 U.S.C. § 1965(c) . For the reasons expressed below, Defendants' motions for summary judgment and to disqualify are DENIED; PG&E's cross-motion for summary judgment is GRANTED IN PART; and PG&E's motion for the issuance of subpoenas is GRANTED.

DISCUSSION

I. THE PARTIES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT ON PG&E'S CLAIM FOR COST OF CAPITAL DAMAGES

A. Introduction

As part of its claim for damages, PG&E seeks to recover its "cost of capital," which it defines as the costs of financing the excess fees exacted by the bid rigging conspirators. Stated another way, PG&E seeks to recover not only the excess fees it incurred because of the overarching conspiracy to rig the bids for electrical work on the Diablo Canyon Nuclear Power Plant, but also the excess finance charges engendered by the excess fees it paid. According to PG&E, the excess fees are between $3.5 million and $4.6 million and the excess finance charges are between $17.5 million and $22.4 million depending on what the company would have paid Foley in a competitive market.

Defendants argue, however, that PG&E's claim for cost of capital damages is actually a disguised claim for prejudgment

interest, which Defendants contend is not recoverable in private antitrust or RICO actions.

Defendants now move for partial summary judgment on this issue. In its opposition, PG&E also moves for partial summary judgment on this issue.

B. Legal Standard

1. Burdens

The moving party bears "the initial responsibility of informing the district court of the basis for its motion . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party must demonstrate that no genuine issue of material fact exists for trial. *Id.* at 322. However, the moving party is not required to *negate* those portions of the nonmoving party's claim on which the nonmoving party bears the burden of proof. *Id.*

Once the moving party demonstrates that there is no genuine issue of material fact, the nonmoving party must designate "specific facts showing that there is a genuine issue for trial." *Id.* at 324. The nonmoving party must "make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

2. Weighing the Evidence

The adjudication of a summary judgment motion is not a "trial on affidavits." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). Credibility determinations and weighing of the evidence are solely jury functions. *Id.* at 255. Inferences drawn from underlying facts must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (*citing United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

However, there may be no genuine issue of material fact if "the evidence is of insufficient caliber or quantity to allow a rational finder of fact" to find for the nonmoving party. *Anderson*, 477 U.S. at 254. And in some circumstances the factual context may render the nonmoving party's claim implausible, and the nonmoving party must come forward with "more persuasive evidence" to support the claim "than would otherwise be necessary." *Matsushita*, 475 U.S. at 587.

C. Analysis

1. Defendants Fischbach & Moore, Inc., Francis Kellstrom and James Korman's Motion for Partial Summary Judgment on PG&E's Claim for Cost of Capital Damages

Both Section 4 of the Clayton Act, 15 U.S.C. § 15, and RICO, 18 U.S.C. § 1964(c), provide that any person who is injured in his business or property by reason of anything forbidden by these statutes is entitled to treble damages. Although the Ninth Circuit has not addressed the issue, the general rule (which PG&E concedes) is that because damages are trebled, a plaintiff who prevails under either of these statutes is not permitted to recover prejudgment interest, except in limited circumstances. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 561-62 (7th Cir. 1986) (Clayton Act); *Louisiana Power & Light Co. v. United Gas Pipe Line Co.*, 642 F.Supp. 781, 811 (E.D.La. 1986) (RICO). In addition, a prevailing plaintiff cannot circumvent the general rule by engaging in semantic subterfuge. *Library of Congress v. Shaw*, 478 U.S. 310, 321-22 (1986). In other words, "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." *Id.* at 321.

The purpose of prejudgment interest is to compensate prevailing parties "for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to

redress." *West Virginia v. United States*, 479 U.S. 305, 310, n.2 (1987). Defendants argue that PG&E's cost of capital constitutes prejudgment interest. According to Defendants, PG&E's prayer for cost of capital damages is nothing more than a claim for compensation that represents loss occasioned by the fact that the payment of the damages alleged would occur long after the alleged injury was suffered. Defendants contend their argument is bolstered by PG&E's explanation of the cost of capital calculation:

> [t]o the extent that PG&E paid excess amounts to Foley, it incurred, and continues to incur, excess financing costs from the dates these payments were made until the date PG&E is reimbursed for the excess fees paid and the accumulated finance costs.

A. Tucker, Report on Quantification of Damages, p. 11.

There is no precise formula for determining damages in either antitrust or RICO cases. In an antitrust case, the plaintiff need only present evidence "sufficient to support a 'just and reasonable inference' of damages." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981). A plaintiff prosecuting a civil RICO claim is entitled to complete recovery for the harm that proximately results from the predicate acts. *Holmes v. Securities Investor Protection Corp.*, ___U.S.___, 112 S.Ct. 1311, 1317 (1992); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989). PG&E alleges that the incremental financing costs (costs of capital) should be considered a component of its total damages because they drove up the company's costs just as directly as did the monopoly profits that PG&E alleges resulted from Defendants' conduct as to Contract 8802 between 1973 and 1977.

The Court agrees with PG&E. First, it was reasonably foreseeable that PG&E would have had to finance the construction of its nuclear power plant. Contract 8802 was a multi-million dollar agreement, which amount PG&E could reasonably have been

expected to borrow. Second, the cost of capital is an acknowledged element of compensatory damages in construction cases. *See Havens Steel Co. v. Randolph Engineering Co.*, 813 F.2d 186, 188 (8th Cir. 1987) (costs of funds borrowed to cover expenses resulting from breach of contract constitute damages not prejudgment interest); *Niagara Mohawk Power Corp. v. Stone & Webster Engineering Corp.*, 1992 WL 121726 at 29 (N.D.N.Y.).

Third, two federal courts that have considered this issue in the context of Sherman Act and RICO cases have concluded that excess financing costs are a recoverable element of damages and do not constitute prejudgment interest. *Minpeco, S.A. v. Hunt*, 718 F.Supp. 168 (S.D.N.Y. 1989) (*Minpeco II*) (affirming its prior ruling in *Minpeco, S.A. v. Hunt*, 686 F.Supp. 420 (S.D.N.Y. 1988) (*Minpeco I*)); *United Power Ass'n, Inc., v. L.K. Comstock & Co.*, 1992-2 Trade Cases (CCH) ¶ 70,055 (D.Minn. 1992). In the *Minpeco* cases, Minpeco asserted antitrust and RICO claims, contending that defendants had manipulated the silver market, causing Minpeco to borrow funds to close out its futures positions. *Minpeco I*, 686 F.Supp. at 425. Before trial, the defendants attempted to exclude Minpeco's interest payments on these loans as "prejudgment interest." The court rejected this argument, holding that the interest costs incurred by Minpeco were "an actual expense, a claim for actual damages which should be treated like any other damage claim." *Id.* at 426. In *Minpeco II*, the court affirmed its holding in *Minpeco I* and explicitly held that the interest paid on the loans was an element of damages subject to trebling. *Minpeco II*, 718 F.Supp. at 180.

The *United Power* Court was faced with a bid rigging case strikingly similar to this one. There, the plaintiffs brought antitrust and RICO claims for an alleged bid rigging conspiracy against many of the defendants in this case. Following *Minpeco*, the *United Power* Court granted plaintiffs' motion for partial summary judgment to establish that the cost of borrowed funds is an element of damages subject to trebling. *United Power*, at p. 69,213. The Court reached this result reasoning that

> it is logical and foreseeable that one component of damages plaintiffs would suffer is the increased financing costs (e.g., the interest) paid over and above what would have been paid had the electrical contracting jobs been competitively bid.

Id.

Fourth, both sides' experts agree that cost of capital is an appropriate cost component. Dr. Robert Harris, PG&E's expert, testified at deposition that absent the conspiracy, PG&E's construction costs and financing costs would have been lower. R. Harris, Report on Quantification of Damages, p. 9. Defendants' expert, David Pike, also testified that inflated construction costs would increase interest costs so long as there is a specific debt incurred for a specific project, Pike Dep., pp. 349-55, and that cost of capital is a cost of doing business. *Id.* at 261-62.

Finally, Defendants' reliance on the cases they cite is misplaced. For example, Defendants argue that the resolution of this issue is controlled by *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), which held that moratory interest could not be included as an element of damages in an antitrust action. In reaching this conclusion, the *Trans World* Court reasoned that trebled damages "more than adequately compensate[d] [the plaintiff] for its injuries." *Id.* at 80. Cost of capital damages were not at issue in *Trans World*, however. Instead, *Trans World* was concerned with the interval between the time the plaintiff was injured and the date of judgment. PG&E is simply not seeking these damages. Instead, it is seeking to recover the actual out-of-pocket expenses it incurred as a result of Defendants' alleged conduct. Replacement costs of money, fraudulently taken from a plaintiff, is as much an element of damages as replacement costs of a car stolen from a plaintiff by a defendant. The mere fact that this damage can be computed in terms of "interest" does not make it impermissible prejudgment interest.

Defendants also cite *Southern Pacific Transp. Co. v. United States*, 471 F.Supp. 1186 (E.D.Cal. 1979). In *Southern Pacific*, the plaintiff brought an action under the Federal Tort Claims Act (FTCA) after boxcars owned by the United States and loaded with bombs exploded in plaintiff's switchyard. As part of its damages, Southern Pacific claimed "loss of use of corporate capital," the profits it lost by having to divert capital from revenue producing projects to explosion related repairs. *Id.* at 1197-98. The *Southern Pacific* Court held that this claim constituted "interest prior to judgment," forbidden by the FTCA. *Id.* at 1199. However, *Southern Pacific* is distinguishable from this case because PG&E is not seeking compensation for "loss of use of corporate capital" or lost profits, but, as explained above, is seeking its actual damages. The other cases cited by Defendants, *Preston v. United States*, 776 F.2d 754, (7th Cir. 1985), and *Marchese v. United States*, 781 F. Supp. 241 (S.D.N.Y. 1991) are similarly distinguishable in that they involved claims for the value lost resulting from the delay in receiving a damage award. PG&E makes no such claim. Its claim for damages is based only on the injury Defendants allegedly caused, not a delay in receiving compensation.

Therefore, Defendants' motion for summary judgment on this issue is DENIED.

2. Plaintiff's Cross-Motion for Partial Summary Judgment on its Claim for Cost of Capital Damages

In its opposition to Defendants' motion for summary judgment on cost of capital damages, PG&E moves for summary judgment on the same issue. Defendants oppose PG&E's motion on the grounds that (1) PG&E filed its motion after the June 1, 1993 filing deadline set by this Court in its March 15, 1993 Scheduling Conference Order and (2) there is no evidence that PG&E borrowed funds specifically for the purpose of financing Contract 8802 or the alleged increase in electrical contracting expense allegedly caused by Defendants' bid rigging.

PG&E's motion is technically untimely given this Court's March 15, 1993 Scheduling Order. However, given this Court's decision to deny Defendants' motion on this issue, it is in the interest of all parties for the Court to clarify the questions left unresolved by that decision. Therefore, the Court will address PG&E's motion.

In response to Defendants' contention that PG&E presents no evidence concerning funds it may have borrowed to finance Contract 8802 or the allegedly excess expense it incurred, PG&E cites the deposition testimony of its expert, Avram Tucker, and the damages report he prepared and the damages report prepared by David Pike, Defendants' expert. Specifically, both Tucker and Pike testified that PG&E borrowed money between 1965 and 1985 to finance the Diablo Canyon project. Tucker Dep., pp. 1596-97; Pike Dep., p. 525. The Tucker report also specifies the excess financing costs PG&E allegedly incurred as a result of the bid rigging. A. Tucker, Report on the Quantification of Damages, p. 12. Defendants present no evidence to the contrary.

It is true that PG&E presents no evidence that the funds it borrowed to finance the Diablo Canyon project were specifically allocated to Contract 8802. Neither party addresses whether PG&E has the burden to do so. However, the issue can be resolved by drawing from the following analogy. Someone building a house often secures construction funds via a mortgage. The funds are secured for the entire project, not separately for the plumbing, carpentry or electrical work, etc. If the owner then brings an action against one of the subcontractors for overcharges, it is simply not reasonable for him or her to have to demonstrate whether the subcontractor was paid using the mortgage funds. It is instead reasonable to assume that the mortgage money was allocated among subcontractors in proportion to the work each performed. Therefore, the owner need only show that the project was financed and the amount of the charges at issue. PG&E has presented uncontroverted evidence demonstrating that financing was necessary for the Diablo Canyon project. Therefore, PG&E's

motion for summary judgment as to the fact that it was required to finance the work performed on Contract 8802 is GRANTED. Since PG&E has only presented evidence demonstrating a range of these damages, the specific amount of excess finance costs it incurred will be subject to proof at trial.

II. DEFENDANTS' MOTIONS TO DISQUALIFY AVRAM TUCKER AND ROBERT HARRIS

A. Legal Standard

Fed. R. Evid. 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

An expert must be shown by the party calling him to possess scientific, technical, or other specified knowledge. Whether the witness is sufficiently qualified as an expert is a matter within the discretion of the court. Fed. R. Evid. 104 (a). Under Rule 702, a witness may be qualified as an expert by virtue of any one such factor, or upon a combination of any of the factors listed in the rule. *Friendship Heights Assoc. v. Vlastimil Koubek*, 785 F.2d 1154, 1160 (4th Cir. 1986); *Exum v. General Electric Co.*, 819 F.2d 1158, 1163 (D.C. Cir. 1987). Courts are to evaluate the qualifications of a potential witness with liberality and flexibility. *See Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990); Michael H.Graham, *Federal Practice and Procedure*, Evidence § 6642 (Interim Ed. 1992).

B. Analysis

1. Defendants' Motion to Disqualify Avram S. Tucker

PG&E has designated Avram Tucker as an expert witness who will testify in two principal areas: (1) the prices electrical contractors would have bid in 1972-73 if there had been competitive bidding for Contract 8802, and (2) the excess finance costs PG&E incurred as a result of the inflated price it allegedly paid for the work on Contract 8802.

Defendants claim that Mr. Tucker is not qualified to testify as an expert witness with respect to the first task. According to Defendants, Mr. Tucker, who is an accountant, does not possess the skill or knowledge within the field of electrical construction bidding to assist the jury in determining what prices would have prevailed under competitive bidding for Contract 8802. Defendants rely on answers given by Mr. Tucker during a deposition on February 1, 1993, which indicate, among other things, that Mr. Tucker was never employed by a construction contractor, has no engineering degree, and has never prepared bids or computed unknown future electrical costs (as opposed to "quantified," or reported construction costs). In support of their position, Defendants cite *United States v. Young Bros., Inc.*, 728 F.2d 682, 692-3 (5th Cir. 1984), *cert. denied*, 469 U.S. 881 (1984). In *Young Bros.*, an accountant was offered as an expert witness in the construction bidding arena. The district court refused to allow the accountant's testimony because his area of expertise did not qualify him to provide insight into construction bidding. The Fifth Circuit affirmed, reasoning that

> [t]he district court was well within its discretion in excluding Wells's testimony on the grounds that he was not qualified to give an expert opinion on the reasonableness of bids submitted for highway construction jobs. The record shows that prior to trial Wells had never worked as a highway contracting estimator, had never done a special

> study of the field, and had no expertise in estimating other than what he had gained in his preparation for his trial testimony.

Id. at 693.

In the present case, however, Plaintiff does offer evidence that Mr. Tucker has expertise in the area of construction contract bidding. According to Mr. Tucker's declaration, he has analyzed more than 100 contractor's bids, including bids involving electrical work, and has consulted on estimates of bids for electrical work to be performed in the future. Tucker Decl., ¶¶ 19, 20. Mr. Tucker also lists numerous other qualifications which demonstrate his competence as an expert in the field.

Defendants reply that the Court should disregard Mr. Tucker's "unsupported" declaration because it was offered well after the close of discovery and includes assertions that could have been made during his deposition, but were not. Defendants point out that when they explored Mr. Tucker's "expert" background at deposition, he did not indicate such expertise. According to Defendants, these considerations should preclude PG&E from making the declaration part of the record.

Defendants' claims are without merit. First, a fair reading of Mr. Tucker's deposition demonstrates that Tucker has used an reasonable and proper approach to the problem and is well qualified to assist the jury in determining the facts of the case. Defendants' efforts at belittling the testimony border on misleading the Court. For example, Defendants repeatedly claim that Mr. Tucker did not indicate any expertise in *electrical* construction bidding that would allow him to identify the proper yardsticks for comparing prices. However, Defendants have not cited any portion of the deposition transcript demonstrating that they specifically asked Mr. Tucker about his experience in analyzing projects involving electrical construction. Therefore, it is unfair for Defendants to claim that Mr. Tucker's declaration, which does

refer to experience in analyzing electrical construction bids, is unsupported by his deposition testimony when Defendants failed to fully develop his background themselves. Furthermore, Defendants' counsel argued that Mr. Tucker testified "he didn't learn anything" from his consultations with people in the electrical construction industry. A review of the deposition indicates, however, that Mr. Tucker actually stated that he had not "learned anything *new*" at the meeting, Tucker Dep., p. 1060 (emphasis added), which, in the context of the argument is an entirely different matter. He also testified that the approach used in quantifying damages had been approved by those he consulted. *Id.*

Second, the introduction of Mr. Tucker's declaration is not "untimely" as Defendants argue. Defendants have failed to cite any authority, and this Court is aware of none, which requires an expert witness to present his qualifications before the close of discovery. Contrary to Defendants' contentions, the declaration is not new evidence in terms of discovery, but rather constitutes an attempt by Plaintiff to supply the factual information Defendants failed to elicit themselves. Therefore, it is totally appropriate for PG&E to submit the declaration of Mr. Tucker in response to Defendants' motion to disqualify him.

Accordingly, Defendants' motion to disqualify Mr. Tucker as an expert witness is DENIED.

2. Defendants' Motion to Disqualify Robert Harris

PG&E has offered Robert Harris to testify as an expert witness regarding prices that would have been bid for Contract 8802 if there had been competitive bidding. Defendants claim that Dr. Harris is not qualified as an expert witness with respect to prices in the electrical construction industry. Defendants contend that Dr. Harris, an economist, knew nothing about electrical construction before being hired and has spent minimal time studying the subject. Defendants further maintain that Harris has not consulted with

electrical contractors about normal margins or markups for overhead and profit in electrical construction bidding.

In response, PG&E argues that Dr. Harris does not need hands-on experience in the electrical construction industry. Academic and professional background, without any practical experience in the field, are sufficient to qualify as an expert under Rule 702. *See Kerstenbaum v. Falstaff Brewing Corp.*, 575 F.2d 564, 575 (5th Cir. 1978). Plaintiff maintains that Dr. Harris' credentials as an economic expert, including his service to the United States Department of Justice and the California State Attorney General, his testimony before the United States Congress and numerous district courts, and the reference to his work by the Supreme Court, qualify him as an expert witness with respect to electrical construction bidding.

PG&E also points out that in *Kerstenbaum*, an economist with only one month's exposure to the field properly qualified as an expert in an antitrust action. *Id.* In that case, the witness studied the beer business and its operations in order to supplement his economic qualifications. In the present case, Plaintiff claims that Dr. Harris has conducted studies in the areas of price fixing and damage estimation, and acted as a consultant and witness with respect to the results of those studies. PG&E also argues that Dr. Harris has worked on this case since 1986, spending 200 hours studying and consulting others about the issues involved.

Defendants claim that *Kerstenbaum* is not applicable because the economist in that case testified as to unreasonable restraints on competition, an area of expertise where neither his qualifications nor Dr. Harris' would be questioned. Defendants point out, however, that unreasonable restraints are not the issue in this case.

Defendants' argument notwithstanding, Dr. Harris is capable of assisting the jury in determining which construction contractors or which construction projects are comparable to Contract 8802 at Diablo Canyon. When an expert is hired to analyze a particular

problem, he is not expected to know all the details with respect to that problem. Rather, hours of research, study, and consultation make him competent to testify. In addition to the credentials listed above, Dr. Harris is an Associate Professor of Economics at UC Berkeley with a specialty in antitrust economics, and he has spent hundreds of hours researching this case. Furthermore, although Dr. Harris' expertise does not reach into the specific area of electrical construction bidding, Defendants offer no reason why such specific expertise would be needed. Therefore, Defendants' motion to disqualify the expert testimony of Dr. Robert Harris is DENIED.

III. PLAINTIFF'S MOTION FOR THE ISSUANCE OF SUBPOENAS PURSUANT To 18 U.S.C. § 1965(c)

PG&E also moves for an order authorizing it to issue subpoenas compelling the presence of Paul Arbogast, Charles Berrell, William Brown, Bancroft Foley and Peter Matthews. Messrs. Arbogast and Brown have indicated to counsel that they have no objection to the issuance of the subpoenas. PG&E has requested that a decision about Mr. Berrell be put off until such time as the Court rules on the admissibility of his prior testimony. Therefore, only the Matthews [and] [sic] Foley subpoenas need be addressed.

A. Legal Standard

Under the RICO provisions, this court has the authority to order nationwide service of process to compel the attendance of witnesses "upon a showing of good cause." 18 U.S.C. § 1965(c). Specifically, the statute provides that

> In any civil or criminal action or proceeding instituted by the United States under this chapter in the district court of the United States for any judicial district, subpoenas issued by such court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action or proceeding no such subpoena shall be issued for

> service upon any individual who resides in another district at a place more than one hundred miles from the place at which such court is held without approval given by a judge upon a showing of good cause.

Id.

B. Analysis

1. Timing of Objections

Peter Matthews has filed the only opposition to this motion. It is unclear whether Mr. Matthews may object at this stage since he has not yet been served with a subpoena and 18 U.S.C. § 1965(c) is silent on this issue. Were this a subpoena issued under Fed. R. Civ. P. 45, the subpoenaed party would file an objection only after being served with the subpoena. It is unclear how 18 U.S.C. § 1965(c) intersects with Fed. R. Civ. P. 45 but, as the Court is presently considering the motion for the issuance of the subpoena, it is appropriate to consider objections at this time.

2. Statutory Interpretation

Matthews argues that PG&E cannot seek subpoenas under the statute because the statute applies only to actions "instituted by the United States" and therefore would not apply to this private action. Under his analysis, "civil," "criminal action," and "proceeding" are all modified by the phrase "instituted by the United States." PG&E's interpretation is that the terms "civil" and "criminal" encompass both private and public actions. It contends that "instituted by the United States" modifies only the word "proceedings." There is no case that addresses how the statute is to be interpreted nor does the legislative history provide guidance for resolving this issue.

Under the RICO statute, the United States has the power to bring civil, criminal, and forfeiture actions. It follows then that if

the statute were limited to actions brought only by the United States, § 1965(c) could have easily been drafted to read "any action or proceeding brought by the United States . . ." or even "In any civil or criminal action or *other* proceeding instituted by the United States . . ." However, Congress chose not to limit the scope of the statute in this way. Given the absence of such limitations, PG&E may properly seek subpoenas under the statute.

3. Good Cause

Section 1965(c) authorizes the court to approve the issuance of a subpoena upon a showing of good cause. There are no reported cases that discuss what constitutes "good cause" in this context.

PG&E contends there is good cause for compelling the presence of Peter Matthews, who is the President of Lord Electric, because Matthews had and continues to have approval power over bids on nuclear plants made by Lord Electric and allegedly was a very important player in the Diablo Canyon Conspiracy. Matthew Kammenzind, the area manager for Lord Electric, has testified that his boss, Matthews, told him that he would receive a telephone call from someone in Salt Lake City, Utah who would tell him the prices which Kammenzind was to include in Lord Electric's bid for Contract 8807. Kammenzind Dep., pp. 23, 25-26. In addition, PG&E maintains that it is critical for the jury to hear Mr. Matthews invoke the Fifth Amendment at trial. PG&E believes that it has adequately established the elements of the bid-rigging scheme but argues that it is important for the jury to see how difficult it has been to get any high level officer to accept responsibility for the wrongs committed by the conspirators and to provide information about them.

Matthews objects to PG&E's motion on the grounds that he was deposed and his deposition is admissible in court. He also notes that throughout his deposition he invoked his rights under the Fifth Amendment and contends that no valid purpose would be served by the repetition of his invocation of his Fifth Amendment rights.

Matthews further argues that since he is not a party, his exercise of his Fifth Amendment right does not constitute admissible evidence against any party to the action. He concludes that compelling it would be a meaningless act.

The facts here are somewhat similar to those in *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1482 (8th Cir. 1987). The witness in *Cerro Gordo* was a non-party but a former employee of a company that was party to the litigation. One of the factors the *Cerro Gordo* court considered was that

> [h]earing [the witness] invoke the privilege informed the jury why the parties with the burden of proof . . . resorted to less direct and more circumstantial evidence than (the witness's own account) of what had occurred. . . . otherwise, the jury might have inferred that the companies did not call the witness to testify because his testimony would have damaged their case.

Id. at 1482. PG&E faces a similar problem in this case. In addition, unlike criminal actions, parties in civil actions are free to raise adverse inferences against witnesses who refuse to testify in response to probative evidence offered against them. *See Baxter v. Palmigiano*, 425 U.S. 308, 319-20. (1976). A personal appearance by Mr. Matthews would allow counsel an opportunity to raise such inferences. Therefore, there is good cause for the issuance of the Matthews subpoena.

Bancroft Foley, the other subpoena candidate, is a defendant in this action and is alleged to have personally profited from the Defendants' bid rigging activity. Given that he also exercised his Fifth Amendment right at his deposition, the analysis applied to Mr. Matthews applies equally to Mr. Foley. Therefore, there is good cause for the issuance of a subpoena as to him.

Accordingly, PG&E's motion for the issuance of subpoenas pursuant to 18 U.S.C. § 1965(c) is GRANTED. PG&E may issue subpoenas to compel the appearances of Paul Arbogast, William Brown, Bancroft Foley and Peter Matthews.

IT IS SO ORDERED.

DATED: San Jose, California
July 27, 1993

/s/ Spencer Williams
Spencer Williams
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 85-2922 SW

September 13, 1993

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff,

--v.--

HOWARD P. FOLEY CO., INC.; HOWARD FOLEY ENTERPRISES, INC.; WISMER AND BECKER CONTRACTING ENGINEERS, INC.; COMSTOCK GROUP, INC., L.K. COMSTOCK & COMPANY, INC.; CONSOLIDATED COMSTOCK CO., INC.; FISCHBACH & MOORE, INC.; FISCHBACH CORP.; LORD ELECTRIC CO., INC.; BANCROFT FOLEY; CHARLES BERRELL; ROBERT ALBRECHT; PAUL HATTEN; CHARLES SCHARFE; FRANCIS KELLSTROM; MATTHEW KAMMENZIND; and JAMES KORMAN,

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER OF JULY 27, 1993 GRANTING PG&E'S MOTION FOR SUMMARY JUDGMENT AS TO COST OF CAPITAL DAMAGES

On July 27, 1993, this Court granted PG&E's motion for partial summary judgment on PG&E's prayer for cost of capital damages. Defendants now move for reconsideration of that Order. For the reasons expressed below, Defendants' motion is DENIED.

DISCUSSION

In its Order of July 27, 1993, this Court determined that PG&E was entitled to recover cost of capital damages incurred as a result of Defendants' conduct, Order of July 27, p. 6, and that PG&E had produced uncontroverted evidence that it was required to finance the work performed on Contract 8802. *Id.* at 11.

Defendants argue that (1) PG&E did not notify them until late in 1992 that it was seeking cost of capital damages, which seriously prejudiced their discovery on this issue; and (2) the Court erred in its cost of capital ruling.

I. The Discovery Issue

According to Defendants, PG&E had numerous opportunities to put them on notice that it was seeking cost of capital damages but failed to do so until November 2, 1992. In support of this argument, Defendants note that none of PG&E's complaints includes a prayer for such relief. They also point out that PG&E did not raise the claim in other pleadings or correspondence it sent to the Court. According to Defendants, the November 2, 1992, notification came in the form of an interrogatory response, which they argue does not constitute a cognizable prayer for such damages. Finally, they point out that no such claim appears in PG&E's Third Amended Complaint, which was filed after the interrogatory response.

This argument is meritless. Damage discovery began on September 9, 1992 and concluded on April 15, 1993. Nothing precluded Defendants from conducting discovery on this issue and they raised no objection while damage discovery was open. Furthermore, they offered no evidence whatsoever to support their argument that they were prejudiced by PG&E's action. Accordingly, it is not appropriate for the Court to reconsider its decision on this ground.

II. The Cost of Capital Issue

Defendants argue that the Court's ruling on PG&E's claim for cost of capital damages disregards the clear weight of authority holding that such relief cannot be recovered in antitrust and RICO actions. They also contend that *Minpeco, S.A. v. Hunt*, 718 F. Supp. 168 (S.D.N.Y. 1989) (affirming its prior ruling in *Minpeco, S.A. v. Hunt*, 686 F. Supp. 420 (S.D.N.Y. 1988)), on which this Court relied in its ruling, was wrongly decided.

In the Order of July 27, 1993, the Court reviewed the cases Defendants cited to support their motion for summary judgment and found them to be inapplicable here. Defendants either ignore or refuse to accept the fact that the authority they cite concerns prejudgment interest, which generally is not recoverable in cases where treble damages are available. Cost of capital is an out-of-pocket expense. Prejudgment interest is not. The latter accrues during the pendency of an action. The former flows directly from conduct upon which the action is based. PG&E's claim for cost of capital damages arises from Defendants' allegedly wrongful conduct, not from the fact that its recovery has been delayed by the pendency of this action. Therefore, PG&E may properly seek cost of capital damages.

Defendants also contest two determinations the Court made in granting PG&E's motion for partial summary judgment: that PG&E's evidence was sufficient to support its motion and that the evidence was uncontroverted.

As to their first contention, Defendants argue that PG&E offered no evidence demonstrating (1) that PG&E borrowed money from outside lenders specifically for Contract 8802, (2) that PG&E incurred financing costs specific to the money borrowed, (3) that PG&E is still paying interest on that money, and (4) that Defendants' illegal conduct proximately caused PG&E to incur all of these damages.

This court rejected Defendants' contention that PG&E was required to prove that it borrowed money specifically for Contract 8802. Instead, the Court hold that PG&E needed only to show that it financed the entire project. The Court also noted that it would then be reasonable to assume that the borrowed funds were allocated in proportion to the work performed by each subcontractor. Order of July 27, 1993, pp. 10-11. Defendants now claim there is no factual or legal support for this conclusion. However, Defendants provide no alternative supported by legal authority.

There is ample evidence demonstrating that PG&E borrowed money to finance the Diablo Canyon project. Not only did Avram Tucker, one of PG&E's damage experts, testify to this fact in his deposition, Tucker Dep., pp. 1596-1597, 1599-1600. Defendants' own expert, David Pike, did as well. Pike Dep., p. 525. Specifically, Pike testified:

> Q. Do you know whether PG&E borrowed money to finance Diablo Canyon?
>
> A. I listened to -- oh, yes, they borrowed money to finance Diablo Canyon, certainly.

Pike Dep., p. 525.

Defendants argue that since the Court must draw all reasonable inferences in favor of the nonmoving party on a motion for summary judgment, it should have construed the previous exchange as follows:

> Q. Do you know [from admissible evidence] whether PG&E borrowed [any] money to finance [something somehow related to] Diablo Canyon?

> A. I listened to [Tucker] -- oh, yes, [I assume] they borrowed [some] money to finance [something related to] Diablo Canyon, certainly.

Defs' Memo. of Points and Auths. in Support of their Motion for Reconsideration, p. 21. Defendants' construction is not reasonable. Pike's statement is unequivocal and unambiguous. The only reasonable inference the Court should have drawn and did draw from the statement is that Pike believed that PG&E borrowed money to finance the Diablo Canyon project.

Defendants also contend that the Court has mistakenly concluded that they have not contested these factual claims. In this regard, Defendants cite portions of David Pike's deposition testimony. However, Pike's testimony indicates that he only disagrees with PG&E's methodology for calculating cost of capital damages. Pike Dep., p. 350. He never unequivocally states that PG&E did not incur excess finance costs. Instead, his deposition testimony about the relationship between overcharges and debt was:

> I don't know. I don't know for sure either way because the level of debt which a corporation takes is based upon its creditworthiness, not based -- generally is not based on a specific project. So I believe that in general that the corporation would achieve that level of debt financing regardless.

Pike Dep., p. 352.

Defendants also attempt to draw the Court's attention to portions of David Pike's expert report which challenge the sufficiency of PG&E's evidence to support its claim for cost of capital damages. Pike Report, ¶¶ 93-95. Like Pike's deposition testimony, his report does not dispute whether PG&E borrowed money to finance the Diablo Canyon project or Contract 8802. It

only contests PG&E's calculus for computing cost of capital damages.

Defendants have not carried their burden of showing why that conclusion warrants reconsideration. Therefore, their motion is DENIED.

The Court determined in its Order of July 27, 1993, that it would be reasonable to assume that PG&E allocated the money it borrowed for the entire Diablo Canyon to each of the subcontractors in proportion to the work each performed. Order of July 27, 1993, pp. 10-11. Therefore, if PG&E did not finance the entire project, PG&E's cost of capital damages will be discounted accordingly. For example, if PG&E financed only 75 percent of the entire project, it can recover finance charges only on 75 percent [of] [sic] the overcharges it incurred on Contract 8802. Of course, PG&E has the burden of proving at trial the specific amount of excess finance costs it incurred.

IT IS SO ORDERED.

DATED: San Jose, California
September 13, 1993

/s/ Spencer Williams
Spencer Williams
United States District Judge

APPENDIX

Order of the Court of Appeals for the Ninth Circuit Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16162

July 30, 1996

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff-Appellant,

--v.--

HOWARD P. FOLEY COMPANY, INC., et al.,

Defendant-Appellees.

NOT FOR PUBLICATION
ORDER

Before:

GOODWIN and REINHARDT, *Circuit Judges*,
and KING,* *District Judge*.

The panel has voted to deny the petition for rehearing. Judge Reinhardt has voted to reject the suggestion for rehearing en banc and Judges Goodwin and King so recommend. The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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* Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Filed July 30, 1996
United States Court of Appeals
Ninth Circuit
Cathy A. Catterson, Clerk

APPENDIX

15 U.S.C. § 15 (1994)

STATUTORY APPENDIX

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only--

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if--

(A) such foreign state would be denied, under section 1605(a)(2) of Title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this action as a procurement entity for itself or for another foreign state.

(c) Definitions

For purposes of this section--

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of Title 28, and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of Title 28.

APPENDIX

Excerpts of Trial Testimony before the United States District Court for the Northern District of California November 18-19, 1993

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 85-2922 SW

November 18, 1993

San Jose, California

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff,

--v.--

HOWARD P. FOLEY COMPANY, INC.; HOWARD FOLEY ENTERPRISES, INC.; WISMER AND BECKER CONTRACTING ENGINEERS, INC.; L.K. COMSTOCK & COMPANY, INC.; CONSOLIDATED COMSTOCK, INC.; FISCHBACH & MOORE, INC.; FISCHBACH CORP.; LORD ELECTRIC CO., INC.; BANCROFT FOLEY; CHARLES BERRELL; ROBERT ALBRECHT; PAUL HATTEN; CHARLES SCHARFE; FRANCIS KELLSTROM; MATTHEW KAMMENZIND; and JAMES KORMAN.

Defendants.

JURY TRIAL

Before: The Honorable SPENCER WILLIAMS, United States District Judge

Excerpts from the testimony of Dr. Avram Tucker, PG&E's Damages Expert.

DIRECT EXAMINATION

Transcript pages 1868-70:

Q. Would you explain the steps that you followed in order to do the calculations which we've just gone through?

* * *

A. Okay. The first step is to determine the job costs incurred by Foley and paid by PG&E.

The second one was to calculate the actual fee percentage and amount paid by PG&E to Foley for overhead and profit.

Q. All right. And what was the third step?

A. The third step was to identify and quantify the yardsticks which would be used to measure what PG&E was paid in the absence of the bid-rigging conspiracy.

So this is what I referred to earlier as what would have happened or what would have been in the absence of a conspiracy.

Q. What is the fourth step?

A. The fourth step simply compares the actual fees paid to Foley based on the fee percentage and what the fees would have been with a different fee percentage to arrive at the overpayment of fees.

Q. And what was the fifth step?

A. The fifth step begins one of three steps that relates to the financing costs. To determine the financing costs related to

the overpayments I had to first determine what years the overpayments were made. And that's what is referred to in step 5.

Q. What is the sixth step?

A. In the sixth step I needed to determine the rate to be used for each year from the time that the overpayment was made until today to figure out and determine what PG&E's cost of capital was.

So I determined a financing rate for each year from the time of the overpayment until 1993. And that's step 6.

Q. What is the seventh step?

A. The seventh step is the multiplication of the overpayments for each year by the rate for each year from the overpayment until December 31st, 1993. So it calculates the total amount of financing charges, costs.

Q. And what was the eighth and final step?

A. By adding together the excess financing costs and the overpayments I was able to arrive at total damages that PG&E incurred.

Id. at 1873-75:

Q. . . . Why is that damages, Mr. Tucker, in your opinion?

A. That's the underlying basis, the overpayment, the difference between what was actually paid and what would have been paid in this example.

Q. And the actually paid was $150 in your example?

A. Yes.

Q. And the would-have-been paid is $50?

A. Right.

Q. O.K. Go on, please. What was the next step?

A. O.K. Now this would be the overpayment during the year in which the overpayment was made. The next step was to determine how much financing costs applied to this overpayment, again from the time of the overpayment until today.

I've used two years as an example here. And I've simplified by using a 10% rate for the financing costs. As an example if you borrowed the money at 10% this would apply.

I then multiplied in VII the $100 times 10% for the first year to show an incurred financing cost of $10 for that year.

At the end of that year, since the money has not yet been repaid to the party who overpaid, they now have to finance $110, both the original $100 plus the $10 that they've incurred for financing costs. Because it has not yet been paid back to them, they have to incur that financing cost for another year.

And so the entire $110 is the accumulated balance for the second year.

I've used, for example purposes, the same 10%. And in the second year the financing costs would be $11, $110 accumulated balance times 10%. That would arrive at $11 of financing costs for the second year.

And if you add together the overpayments and each year's financing costs, in this example you'd have $121 of damages.

Q. Now in the real calculations which you've given us a summary of earlier, did the financing costs stop at the end of two years?

A. No. They would have gone on from the time of the overpayments in 1973 or '74 until 1977, from that period, until today.

Id. at 1957-1959:

Q. Mr. Tucker, did you prepare a chart that shows PG&E annual financing rates?

A. Yes.

Q. Would you please describe this generally?

A. Yes. These are financing rates from each year from 1974 to 1993 that I utilized as the financing rates for overpayments in each year until 1993.

Q. Now I notice there's no rate for 1973. Why is that?

A. Well, there were some payments made in 1973, but I assumed that the payments were made at the end of the year, and calculated interest only from the end of the year for each successive year until 1993.

Q. Why did you include financing rates from 1974 through 1993?

A. Well, for example, all costs that were incurred at a particular time or overpaid at a particular time, PG&E has

had to finance those overpayments until at least now or until they are paid back for the overpayments.

Q. What does each line represent? For example, 1974 says 8.2%.

A. 8.2% is the weighted average cost of capital that I've used for the financing cost rate for PG&E in 1974. That's my determination or use of a weighted average financing cost.

Q. What is the source for these rates?

A. This is based on an analysis of PG&E's computations or work papers where they calculate their financing cost that they use when they record their construction costs, for example, for Diablo Canyon and other power plants and assets.

They make a computation of their weighted average cost of capital, and these are the rates that they use.

Q. Now is this the mysterious AFUDC again?

A. Yes.

Q. And explain what you mean by "weighted average rates"?

A. This is an effective rate that includes PG&E's cost of obtaining debt, short- and long-term debt; it's preferred stock; and also the cost of equity that it attracts from shareholders.

Q. Well, what -- what is -- what is it mean -- strike that. What do you mean by "weighted average"?

A. Well, it takes into account that there may be more of one type of financing than another. So for example, if debt was

70% of the total and preferred stock or equity was 30%, it would weight the 70% that rate more than it would the equity cost.

Id. at pp. 1962-1964:

Q. Have you prepared a chart summarizing your calculations of PG&E's damages, including now both the overpayments and finance costs?

A. Yes, on Transparency 19.

Q. And would you describe this generally for us?

A. Yes. This is the same three categories or ranges that I discussed earlier at 8%, 6% and 4%.

The second column, overpayment of fees, are the amounts that I previously discussed. The overpayment of fees comparing 15% to 8%, 15% to 6%, and 15% to 4%.

To that I've now added the results of my calculation of the financing costs from the 1973s when the overpayments were made -- excuse me -- the middle part of the 1970s when the overpayments were made, until December 31st, 1993, for financing costs.

Q. Well, let's take these one at a time. What -- what were the financing costs at an assumed cost-plus level of 8%?

A. PG&E would have incurred in excess [of] [sic] $19,595,278 of financing costs through December 31st, 1993.

Q. And to that you added something else?

A. What I did was in the far right column under damages as of December 31st, 1993, I added the $19,595,278 of financing

and the $3,546,913 of overpayment of fees to arrive at total damages of $23,146,191.

Q. Now let's go through the 6% line, Mr. Tucker. Let's start with the overpayment of fees at that level. If that had been the cost-plus percentage under the terms of Change Order 11.

A. Yes. The overpayment of fees as what had been previously described and summarized of $4,560,317.

Q. And how much would the financing costs have been on that amount?

A. $25,199,086.

Q. For a total damages of what?

A. $29,759,403.

Q. Now assuming that Foley would have done the Change Order 11 work at cost plus 4%, what was the overpayment of fees?

A. $5,573,721.

Q. How much were [sic] the financing costs be as of December 31st, 1993?

A. $30,798,879.

Q. And what would the total be?

A. $36,372,600.

Id. at pp. 1965-1973:

Q. Now let's take the middle one of those three your ranges. Take the 6%. What's roughly the relationship between the financing costs and the overpayment of fees?

A. Well, the financing costs are actually five to six times the overpayment of fees.

Q. Why are the financing costs that high a multiple of the overpayment of fees?

A. Well, there's two reasons. One is that the rates that PG&E financed -- or its financing costs during the 1980s were quite high because interest rates and other costs of obtaining capital were high.

But I think more important was the fact that we're talking about a 20-year period from [sic] some of these costs. In other words, PG&E financed these costs from 1973, '74, '75, I guess through '77, each of those yearly overpayments all the way through until December 31, 1993.

Q. Have you prepared a simplified illustration of the relationship between applied financing costs should -- could be that high a multiple of actual costs?

A. Yes. Transparency 20 has a, again, a simplified example to demonstrate what happens when you have a long-term period of financing costs.

Q. Would you explain this to the jury, please?

A. Yes. This demonstrates what would happen with -- in an overpayment of fees of $100 in 1973 and financing costs assumed at 10% a year, what the total financing costs would be until 1993, and what the accumulated amount if

you added the financing cost and the overpayment would be.

Q. Could you work through just the first couple years of this and show how the calculation works?

A. Yes. The $100 in 1973, if financed for one year, again since I assumed it was at the end of the year it shows no financing costs for 1973, but then it would be financed all of 1974 at 10% for a financing cost of $10, 10% times $100.

The accumulated balance would then be $110, and that's the amount that PG&E would have to finance for the next year.

So the next year I've multiplied the accumulated balance from 1974 of $110 by the assumed financing cost rate of 10%. And in 1975 that now results in a -- a yearly cost of $11, 10% times $110.

If you add the $11 then you have a cumulative overpayment and interest of $121.

I performed that same calculation each year and the yearly financing costs continued to increase because you're financing not just the overpayment but the previous financing costs, which have not yet been paid back.

Q. And the bottom line result is what --

A. The --

Q. -- in your hypothetical example?

A. The $100 would have $573 of financing costs. And if you added the $100 to that it would be a total balance of $673.

Q. Can you give any ordinary person examples of why financing costs are so high?

A. Well, I think this is exactly what would happen is if you had a credit card balance of $100 and an interest rate of 10% and for some reason didn't pay off your credit card for 20 years. You would end up with accumulated interest similar to this or the same as --

Q. Have --

A. -- this.

Q. Have you prepared a chart illustrating that?

A. Yes. Transparency 21 shows what would happen with a -- oh, excuse me.

(Comments off the record.)

Q. All right. What is Transparency 21, Mr. Tucker?

A. This is really just a graphic -- graphic depiction of what I just described, although this would be with a credit card. If you had a balance in 1973 of $100 and never paid the balance down, the interest would continue to accrue all the way through 1993. And the red portion shows the increase in financing cost. The blue line shows the steady $100 that has not yet been paid down.

Q. Now in making the calculations of PG&E's financing costs in this case, did you apply PG&E's annual financing rates to 100% of the excess payments to Foley?

A. Yes, I did.

Q. Why?

A. That gives the best measure of what the cost to PG&E was to finance these excess payments.

Q. And is that based on your opinion -- or do you have an opinion as to whether PG&E financed 100% the cost of construction at Diablo Canyon?

A. Yes. I do believe they financed 100% of the cost on Diablo Canyon.

Q. And what's the basis for that opinion?

A. As I mentioned earlier, the -- I studied the financing class quite extensively, and Diablo Canyon cost almost $6 billion. And that was something that PG&E had to go out and get significant capital to construct Diablo Canyon.

And they did that in a variety of means. They went out and they got short-term debt, long-term debt, preferred stock, common equity, and they used retained earnings. In other words, earnings that had not been paid out.

All of those costs have a cost to PG&E -- excuse me -- all of those sources of capital have a cost to PG&E. And therefore I believe it's appropriate to take the cost, the weighted average as I've calculated, and apply it to 100% of the cost of the plant, or in this case, of the overpayments.

Q. Is your opinion that PG&E financed 100% of Diablo Canyon construction costs consistent with the way PG&E maintains its accounting records and prepares its financial statements?

A. Yes. When PG&E calculates the costs of Diablo, it is -- determines a rate for AFUDC as we described. And it

multiples [sic] that rate times 100% of the expenditures and the previously accumulated AFUDC.

In other words, the same accumulated balance, 100% of that is multiplied by the AFUDC rate. That amount is then added in as a cost of an asset, which is then put on their financial statements.

Q. Is the way that PG&E maintains its accounting records and prepares its financial statements mandated by any government agency?

A. As I described earlier, the regulatory agencies like the Federal Energy Regulatory Commission and the California Public Utility Commission do dictate to PG&E how they shall calculate their weighted average cost, and they do dictate that it be applied against 100% of the cost of the project, and also be included in the financial statements that way.

So if you were to look at a filing to the Public Utility Commission, it would be calculated in that manner.

Q. Now have you made an alternative calculation of the cost of capital that PG&E incurred as a result of overcharges by Foley at Diablo Canyon?

A. Yes.

Q. Would you explain what this is, Mr. Tucker?

A. These are financing cost rates. If you only studied the short-term financing costs of PG&E, as opposed to their weighted average of all of the short- and long-term debt, preferred stock, and common equity. So the rates -- excuse me -- are different because they only deal with the average short-term financing rates.

Q. Did you cover the same years as you had for your AFUDC calculation?

A. Yes.

Q. What are the sources of information that are shown in this transparency?

A. I know it's hard to read, but they're identified at the bottom and they really relate to PG&E's financial statements and certain internal money management reports. The rates came from their corporate documents that identify short-term interest rates.

Q. Have you in your experience doing damage analyses sometimes calculated financing cost damages this way?

A. Yes. In the past I have used a specific rate times 100% of the damage amounts to calculate financing costs.

Q. In what circumstances did you do that?

A. In certain circumstances where it's believed that a particular debt instrument, like short-term debt in this case, would be paid down if the overpayments had not been made. In other words, the short-term interest balance would be lower if PG&E had the overpayments. Then it would be appropriate to use a particular rate times the entire overpayment.

Q. Is that the case here in this matter that we're here --

A. No, I --

Q. -- discussing?

A. Excuse me. I think as a general proposition it is a better measure of PG&E's cost to use their weighted average cost because as a general proposition PG&E acquires capital for all of its construction purposes and then uses that for its construction purposes. So I believe a better way to look at this would be the average of what PG&E would not have had to occur [sic] or obtain in the terms of financing.

Q. Now have you taken these financing rates, based on this alternative short-term borrowing model, and used those to calculate financing costs?

A. Yes. I performed a calculation of what the financing cost and total damages would be if I used these rates as opposed to the weighted average cost.

Q. Would you explain the results of your analysis using the alternative short-term interest rate method?

A. O.K. The first two columns, the fee percentage and the overpayments, would be the same as we've discussed before.

Q. In other words, a fee percentage range of 8%, 6% and 4%?

A. That's correct.

Q. And --

A. Eh, -- the third column, the financing cost through 12/31/93, would be PG&E's cost of financing, but using the short-term rates as opposed to the weighted average cost of capital. And then the far right column, the damages as of December 31st, 1993, would be the sum of those financing costs and the overpayment of fees at each of the percentages, 8%, 6% and 4%.

Q. And what is the sum of the damages, if you assume that PG&E would have paid the fee of 8%?

A. $15,943,274.

Q. And what is the sum if you assume PG&E would have paid a 6% under those alternative method of calculations?

A. $20,498,501.

Q. And what is the total if you assume that PG&E would have paid -- paid Foley a fee of 4%?

A. $25,053,720.

Q. Mr. Tucker, do you believe that this short-term interest rate method that we just went through is the best measure of PG&E's cost to finance the excess payments?

A. No. As I stated before I think the weighted average would be a better reflection on what PG&E's increased costs were.

* * *

CROSS-EXAMINATION

Id. at 1989-1990:

Q. Now did PG&E make a specific bank loan in 1973 for the purpose of financing electrical construction work at Diablo Canyon?

Mr. Fleisig: Objection, Your Honor.

The Court: Sustained.

Mr. Fleisig: Sidebar, please?

The Court: Sustained.

Mr. Fleisig: Sustained.

By Mr. Spivack:

Q. Did PG&E issue any commercial paper in 1973, 1974, 1975, 1976 or 1977 for the specific purpose of financing electrical construction work at Diablo Canyon?

Mr. Fleisig: Objection, Your Honor.

The Court: Same ruling.

Mr. Spivack: I think we ought to have a sidebar, Your Honor.

The Court: Yes, I do, to [sic].

* * *

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Civil No. 85-2922 SW

November 19, 1993

San Jose, California

PACIFIC GAS AND ELECTRIC COMPANY,

Plaintiff,

--v.--

HOWARD P. FOLEY COMPANY, INC.; HOWARD FOLEY ENTERPRISES, INC.; WISMER AND BECKER CONTRACTING ENGINEERS, INC.; L.K. COMSTOCK & COMPANY, INC.; CONSOLIDATED COMSTOCK, INC.; FISCHBACH & MOORE, INC.; FISCHBACH CORP.; LORD ELECTRIC CO., INC.; BANCROFT FOLEY; CHARLES BERRELL; ROBERT ALBRECHT; PAUL HATTEN; CHARLES SCHARFE; FRANCIS KELLSTROM; MATTHEW KAMMENZIND; and JAMES KORMAN.

Defendants.

JURY TRIAL

Before: The Honorable SPENCER WILLIAMS, United States District Judge

Excerpts from the testimony of Dr. Avram Tucker, PG&E's damages expert.

Transcript pages 2067-2069:

OPEN COURT, JURY NOT PRESENT

The Court: . . . Insofar as capital costs are concerned in my response to the defendants' motion to clarify, we indicated that we have testimony by the plaintiff's witness that it was fully financed. Proper cross-examination, I think, would be to determine not what the untapped credit availability, but what money has been borrowed, what the outstanding debt, and how much was used for construction.

Now I think that's a proper area of cross-examination, but in the order of September 13th that the Court determined its order -- in its order of July 27th, that it would be reasonable to assume the [sic] PG&E allocated the money it borrowed for the entire -- oh, this is concerning among the subcontractors -- in proportion to work performed.

I don't know how PG&E handles its account, construction account. I don't know how much is financed by borrowed money or not. But I did say: if PG&E did not finance the entire project, PG&E's cost of capital damages will be discounted accordingly.

For example, if PG&E financed only 75% of the entire project, it can recover finance charges only on 75% of the overcharges.

So that's the area of proper inquiry: how much was -- and I think since they testified that -- their witness testified it was fully financed and we have indications that Pike indicated the same, though there's some ambiguity in that point, in his mind at least -- or the defendants' mind at least -- the proper examination there would be how much -- if all of it was financed how was the financing handled. I assume that PG&E has some outstanding debts as well as lots of outstanding credit. O.K.

I hope that clarifies those two issues.

And now how do you wish to proceed? Do you want to bring Mr. Tucker in for further cross-examination?

Mr. Spivack: Yes. I'd like to ask him the questions we asked after --

The Court: Sure.

Mr. Spivack: -- the jury left.

CROSS-EXAMINATION, RESUMED

Id. at pp. 2080-2083:

Q. Good morning, Mr. Tucker.

A. Good morning.

Q. Would you tell me again what the overcharge was that you calculated assuming that absent a conspiracy, PG&E and Foley would have negotiated a price below cost-plus 15%?

A. If PG&E had paid 8%, the damages or PG&E's increased cost would be approximately $23 million.

Would you like the exact number?

$23,146,191.

Would you like the other ones --

Q. How much of the overcharge -- how much of that $23 million is overcharge and how much is interest?

A. $3,546,913 is the overpayment.

$19,599,278 is the financing cost.

Q. At 6%?

A. $4,560,317.

20 --

Q. Interest.

A. -- $25,199,086.

Q. That's -- that's --

A. $29,759,403.

Q. 4%?

A. $5,573.

Q. $5,5?

A. Yeah. $5,573,000. Excuse me.

Q. O.K.

A. 721. $30,798,879. Total of $36,372,600.

Q. Now when you figured the interest on the overcharge -- let's take the 8% figure, 3.5 million. When you figured the interest every year from 1973 through 1993, did you figure the interest on the total $3,546,913?

A. Yes, I did.

Q. Was the total $3,546,913 borrowed?

A. I'd need a little definition of what your term "borrowed" means.

Q. I --

A. It was financed in my opinion.

Q. Well, did they get that money either from a bank for [sic] from a bond or from a short-term note? That is, did they borrow it from a third party as opposed to get the money from issuance of capital stock or preferred stock or from operations?

A. O.K. No. Some of it came from preferred stock and common stock which was from third parties.

Some of it was from retained earnings which would be money that they had previously gotten through revenues.

Q. O.K. Now you used a rate when you calculated the interest charge, there was a rate of interest you applied to whatever principal you thought was applicable?

A. That's correct.

Q. Now that rate of interest that you charged, was that a rate of interest based solely on the rate at which PG&E borrowed money, or did that rate include a mix of the rate at which PG&E borrowed money and the rate at which PG&E had a cost of capital based on common stock and preferred stock?

A. In my first calculation it was a weighted average which included both.

Q. O.K.

A. And the short-term interest one, it only included an interest rate.

Q. Thank you.

Mr. Spivack: No further questions, Your Honor.

Id. at 2117-2118:

The Court: I have a couple of questions.

We're talking about the source of funds for construction of the Diablo Canyon. You said it was fully financed, correct?

The witness: In my opinion, that's correct, sir.

The Court: And then you said source of bonds and some stock and some other revenue or something. What was the third category?

The witness: Retained earnings.

The Court: Pardon me?

The witness: Retained earnings.

The Court: You didn't put a percentage on any of those, did you, how much each was allocated for?

The witness: That's correct.

The Court: Now when a corporation sell [sic] bonds, that's an obligation they have to repay, isn't it, at least --

The witness: Ye -- Yes.

The Court: -- They pay interest on it and ultimately it -- the bond matures and they pay off on it.

The witness: That's correct.

The Court: A sale of stock is just a sale of interest in the company and doesn't create a debt, does it?

The witness: It doesn't create a legal debt, in my understanding. There is a cost to the stock. But you're right, it isn't a requirement that they pay it back.

The Court: Yeah, it's --

The witness: But it's viewed by the Regulatory Commission as a cost of obtaining the capital.

The Court: I see. And as far as revenues are concerned, that's not a loan or borrowed, it's just revenue that comes in. And it's committed to operations or construction; is that correct?

The witness: That's correct.

The Court: O.K. No further questions.

Mr. Fleisig: May Mr. Tucker be excused, Your Honor?

The Court: Yes.

The witness: Thank you, Your Honor.

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No. 96-644

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

FISCHBACH AND MOORE, INC.,

Petitioner,

—v.—

PACIFIC GAS & ELECTRIC COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTION PRESENTED

Contrary to the assertion of Petitioner Fischbach & Moore, Inc. ("Fischbach"), this case presents *no* question whatsoever concerning the availability of prejudgment interest in federal antitrust cases, as Respondent Pacific Gas & Electric Company ("PG&E") has not yet requested an award of prejudgment interest and neither court below has ever ruled that PG&E is entitled to one. Rather, the question presented is this:

Where bid-rigging conspirators are found liable for an illegal overcharge stemming from an antitrust violation, may the plaintiff recover treble damages for its actual costs to finance the overcharge?

Rule 29.6 Statement

Pursuant to Rule 29.6, respondent informs the Court that Pacific Gas & Electric Company has issued shares which are publicly traded in the United States. No other subsidiary or affiliate of PG&E is owned in part by anyone other than PG&E with the following exceptions:

Altresco Lynn, Inc.
Altresco, Inc.
Avoca Natural Gas Storage
BBB Generating Company
Beacon Gas Services, Inc.
Beale Generating Company
Berkshire Pittsfield, Inc.
Bowdoin Storage Services, Inc.
Caldera Enterprises, Ltd.
Caldera Generating Company, Ltd.
Carneys Point Generating Company
Cauca Valley (Bermuda), Limited
CCC Generating Company
Coastal Cryogenics Tankship Corporation
Compañia Samalayuca II, S.A. DE C.V.
Dabhol Generating Company, Ltd.
Dyna Makowski Power Company
ELEKTROGAZ Ventures Ltd.
First Oregon Land Corporation
Garnet Power Corporation
InterGen Pipeline Company, Ltd.
International Generating Company (Hong Kong) Limited
International Generating Company (U.K.) Limited
International Generating Company, Inc.
International Generating Company, Ltd.
J. Makowski (CBM), Ltd.
J. Makowski (Netherlands) B.V.
J. Makowski (Texas), Inc.
J. Makowski Associates, Inc.

J. Makowski Company, Inc.
J. Makowski Management Corporation
J. Makowski Pittsfield, Inc.
J. Makowski Services, Inc.
JMC (Storage), Inc.
JMC (U.K.), Ltd.
JMC Altresco, Inc.
JMC Avoca, Inc.
JMC Beacon, Inc.
JMC Bethpage, Inc.
JMC Caldas, Inc.
JMC Cauca Valley, Inc.
JMC Cayuta, Inc.
JMC Development Company, Inc.
JMC International, Inc.
JMC Iroquois, Inc.
JMC Northwest Ventures, Inc.
JMC Ocean State Corporation
JMC Pipeline Services Company, Inc.
JMC Portland (Investors), Inc.
JMC Selkirk Holdings, Inc.
JMC Selkirk, Inc.
JMC West Lynn, Inc.
JMCS I Holdings, Inc.
JMCS I Management, Inc.
Makowski (Clean Energy) Investors, Inc.
Makowski Northwest, Inc.
Makowski Selkirk Holdings, Inc.
MASSPOWER, Inc.
Meizhou Wan Generating Company, Ltd.
Northeast Gas Markets, Inc.
Northeast Gas, Inc.
Orchard Gas Corporation
OSP Finance Company
Pittsfield Partners, Inc.
Power Enterprises (Bermuda), L.P.
Power Enterprises Corporation Limited (Bermuda)

PPN Generating Company, Ltd.
PPN Mauritius Company
PPNG, Ltd.
Quezon Generating Company, Ltd.
Rocksavage Generating Company, Ltd.
Rocksavage Power Company, Ltd.
SAM II Equity Funding, LLC
SAM II Generating Company (Cayman), Ltd.
SAM II Generating Company (U.S.), Inc.
Selkirk Cogen Funding Corporation
Standard Pacific Gas Line Incorporated
Topaz Power Corporation
U.S. Generating (Canada) Ltd.
USGen Fuel Services, Inc.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PG&E respectfully requests that this Court deny Fischbach's petition for a writ of certiorari, seeking review of one aspect of the Ninth Circuit's unreported opinion in this case. A copy of the unreported opinion is attached to Fischbach's petition at App. 1a. The portion of that opinion as to which Fischbach seeks review appears at pages App. 16a-18a.

STATEMENT OF THE CASE

PG&E accepts petitioner's statement of the case with the following exceptions.

Mr. Avram Tucker, PG&E's damage expert, testified that a competitive price for the work performed would have been within a range no less than cost plus four percent and no greater than cost plus eight percent. (*See* App. 77a.) On that basis, he testified that the illegal overcharge would have ranged as high as $5,573,721 (App. 90a-91a), rather than the "approximately $4 million" stated by Fischbach. (Pet. at 2.)

More egregious, though not at all germane to the issue, is Fischbach's bold assertion that the jury voted "9-1 in favor of Fischbach." (Pet. at 2.) This assertion is unsupported by any record citation and there is none that would support such a statement since the jurors were never polled as to how, if at all, they each voted.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner's argument simply assumes at the outset the proposition that "PG&E's finance costs are the equivalent of prejudgment interest." (Pet. at 4.) Neither court below was willing to engage in that supposition. The Ninth Circuit, quoting the district court, said:

> [PG&E's] [c]ost of capital is an out-of-pocket expense. *Prejudgment interest is not.* The latter accrues during the pendency of an action. The former flows directly from conduct upon which the action is based. PG&E's claim for cost of capital damages arises from [d]efendants' allegedly wrongful conduct, not from the fact that its recovery has been delayed by the pendency of this action.
>
> (App. 17a.) (Emphasis added.)

Accordingly, the Ninth Circuit determined that in the retrial of this action PG&E "should recover [its] finance costs, regardless of where [PG&E] got the funds" to pay for the illegal overcharge for electrical construction work at its Diablo Canyon Nuclear Power Plant ("Diablo Canyon"). (App. 18a.)

The only other courts to consider the issue of recovering actual financing costs, Judge Lasker of the Southern District of New York in *Minpeco, S.A. v. Hunt*, 718 F.Supp. 168, 180 (S.D.N.Y. 1989) (affirming its prior ruling in *Minpeco, S.A. v. Hunt*, 686 F.Supp. 420, 425-27 (S.D.N.Y. 1988), and Judge Alsop of the District of Minnesota in *United Power Ass'n, Inc. v. L.K. Comstock & Co., 1992-2 Trade Cas.* (CCH) ¶ 70,055 at p. 69,208 (D.Minn. Oct. 27, 1992),[1] issued opinions that are completely consistent with the Ninth Circuit and

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[1] *United Power Ass'n.* involved an identical bid-rigging conspiracy which included many of the defendants here, including Fischbach. 1992-2 Trade Cas. (CCH) ¶ 70,055 at p. 69,209.

district court here. Both distinguished actual financing costs incurred by a plaintiff well before the start of any litigation, such as out-of-pocket payments of interest on a construction loan, from the concept of "prejudgment interest," which is intended to substitute for economic gain that might have been achieved on the investment of the recovered damages, if the plaintiff had use of the money.

In its petition, Fischbach urges this Court to adopt an unprecedented exception to established antitrust jurisprudence: no court has ever limited the *actual costs* that an antitrust plaintiff may recover as damages in the manner advocated by Fischbach. Fischbach supports its argument by citing *solely* to cases denying recovery for conjectural lost investment opportunity and ignoring cases distinguishing such claims from legitimate claims for actual financing costs, such as out-of-pocket interest payments to lenders.

Fischbach's petition fails to recognize that the fact that the courts and Congress have severely restricted monetary awards for the lost opportunity to invest a recovery of funds wrongfully taken from a plaintiff does *not* mean that the courts and Congress intended to restrict the elements of the recovery itself. PG&E does not dispute Fischbach's assertion that in cases arising under the Sherman Act, the courts and Congress have limited awards for the lost opportunity to invest a recovery by restricting prejudgment interest awards to the period of time during which an action was actually pending and only to instances where the plaintiff can prove that the defendant has engaged in dilatory conduct during the litigation process.

But, a limitation on allowing recovery for a lost investment opportunity, no matter how severe the limitation or how great the missed investment opportunity, is still an entirely different matter than prohibiting a plaintiff from proving at trial that a defendant's conduct forced the plaintiff to incur increased financing costs by wrongfully inflating the amount of capital for which plaintiff had to obtain financing. A plain-

tiff, like PG&E, who pays a bid-rigged price for a large, capital intensive construction project, like Diablo Canyon, not only loses the illegal overcharge, but also incurs actual costs to finance the overcharge. On the other hand, a plaintiff who claims to have lost an opportunity to invest his recovery may well have been injured, as Fischbach points out (Pet. at 11), but not in the same way. He suffers an economic injury of sorts, but the injury does not result in actual finance costs. Rather, it is a lost opportunity for gain. Such an injury is less readily ascertainable, less tangible, more ephemeral, more conjectural and generally more difficult to prove. *See Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2nd Cir. 1971) (prejudgment interest generally not awarded on unliquidated damages due to difficulty in ascertaining precise amount to be awarded). That the courts and Congress have determined that such awards should be severely limited does not even begin to suggest, much less prove, that they intended also to restrict a plaintiff's recovery for the actual expense of increased financing costs that a defendant has proximately caused. That is the precise point made by the two courts below, as well as the *Minpeco* and *United Power Ass'n* courts.

As explained below, nothing in the text of the prejudgment interest cases Fischbach cites and nothing in the legislative history of the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 1154 (1980) (hereinafter, "the 1980 Act"), or any other act, even remotely suggests that Congress or any court ever intended to exempt bid-riggers from liability for the added financing costs plaintiffs were forced to pay as a result of the bid-riggers' conspiratorial conduct. Fischbach's entire petition is meritless—it confuses non-recoverable lost investment opportunities with completely recoverable actual financing costs, such as out-of-pocket interest payments to third-parties.

I. THE CASE LAW FISCHBACH CITES IS COMPLETELY INAPPOSITE.

The practical issue presented by Fischbach's petition is whether in keeping with traditional authority on antitrust damages,[2] PG&E should be allowed to present evidence at a retrial of this action that it suffered actual financing costs as a proximate result of the defendants' bid-rigging conduct.[3] Citing a host of irrelevant Federal Tort Claims Act ("FTCA"), Age Discrimination in Employment Act ("ADEA"), RICO and other cases, including antitrust cases, that discuss whether a plaintiff can recover prejudgment interest, that is, lost investment opportunities (Pet. at 6-24), Fischbach argues that such claims are no different than PG&E's claim for actual financing expenses incurred as a direct result of bid-rigging. Fischbach cites no case, and PG&E knows of none, which so holds.

PG&E agrees with Fischbach that lost investment opportunity is not a traditional element of antitrust damages. However, the cases cited by Fischbach do not support a rule that excludes actual financing costs from the scope of antitrust damages. Indeed, the cases Fischbach cites are far off the point it tries to make:

- Fischbach's reliance on the Court's decision in *Library of Congress v. Shaw*, 478 U.S. 310 (1986), is completely inapposite. The source of a "no-interest

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[2] *See Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972).

[3] At this stage, of course, there has been no factual determination that PG&E actually suffered any increase in its financing costs on account of the bid-rigging. The issue Fischbach wants this Court to address is whether the Ninth Circuit was correct when it determined that PG&E should be given an opportunity to prove at retrial that its actual financing costs were increased due to the conspiratorial activity. (App. 18a.)

rule" there was the doctrine of sovereign immunity: "The no-interest rule is to the effect that interest cannot be recovered in a suit against the government in the absence of an express waiver of sovereign immunity from an award of interest." *Id.* at 311. The issue was whether the government had waived sovereign immunity protection to allow claims for interest to be made in certain civil rights actions. *Id.* The instant action involves civil litigants.

Moreover, *Library of Congress* did *not* concern financing costs at all. The plaintiff in *Library of Congress* never financed anything.[4] Plaintiff merely sought to compensate his own attorney "for the money [his attorney] *could have earned had he been paid earlier and invested the funds.*" 478 U.S. at 313 (emphasis added.) PG&E is not making a claim for lost opportunity costs.[5]

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[4] Apparently, the plaintiff paid nothing to his attorney during the course of the litigation. *See* 478 U.S. at 313 ("court awarded fees are normally received long after the legal services are rendered"). Since plaintiff had no need to borrow, he incurred no financing costs.

[5] In an effort to make *Library of Congress* seem relevant, Fischbach traces its lineage back through *United States v. Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976)—another sovereign immunity case—to *Myerle v. United States*, 33 Ct. Cl. 1 (1897). (Pet at 14-16.) But, *Myerle*, like *Library of Congress* and all the cases in between, is a sovereign immunity case. The Court of Claims in *Myerle* interpreted the statute in question as a bar to all claims against the United States for interest. 33 Ct. Cl. at 25 (citing Rev. Stat. § 1091, formerly 28 U.S.C. § 284, current version at 28 U.S.C. § 2516 (1996). *See Boston Sand and Gravel Co. v. U.S.*, 278 U.S. 41, 48 (1928)). The statute, in pertinent part, provided: "No interest shall be allowed upon any claim . . . by the Court of Claims." The plaintiff in *Myerle* had several claims against the United States and borrowed the amount of the claims from financial institutions while waiting for a judgment and asked that the interest paid on the loans be added to the judgment. *Id.* at 7-8. Whether or not his claim was the functional equivalent of prejudgment interest was not an issue and was never discussed. The Court of Claims inter-

- Similarly, in *Preston v. United States*, 776 F.2d 754 (7th Cir. 1985), the plaintiff did *not* claim he had incurred any interest obligations or other financing costs. Instead, the plaintiff sought "to recover for *the loss of the use of money*" or, in other words, plaintiff claimed only "prejudgment interest," which is barred by the FTCA. *Id.* at 760. Again, PG&E makes no claim for lost investment opportunities. PG&E's claim is for a wrongful increase in its actual financing costs. *Preston* has no bearing on whether PG&E ought to be allowed to recover actual financing costs it incurred as a direct and proximate result of the bid-rigging by defendants.

- In another case cited by Fischbach, *Marchese v. United States*, 781 F.Supp. 241 (S.D.N.Y 1991), the plaintiffs were "only seeking to recover the *interest they could have earned* on their certificates of deposit," in other words, a lost investment opportunity. 781 F.Supp. at 247 (emphasis added). They did *not* claim that they had increased financing costs as a result of the defendants' conduct, as PG&E does here.

- In *Southern Pacific Transportation Co. v. United States*, 471 F.Supp. 1186 (E.D. Cal. 1979), discussed by Fischbach (Pet. at 17), the plaintiff railroad was not permitted to recover damages to cover "the loss of use of corporate capital" which it "was forced to divert . . . away from other planned projects to costs

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preted § 1091 to sweep in all claims for interest without distinguishing between claims for actual financing costs or claims for prejudgment interest. And the Claims Court certainly did not consider whether the former was the functional equivalent of the latter. It did not consider such issues because it interpreted the statute as broad enough to bar any and all claims for interest. There is no similar statute at issue in the instant case. The 1980 Act addresses only prejudgment interest, that is, awards for the lost opportunity to invest a recovery.

and expenses resulting from the effect of the explosions." 471 F.Supp. at 1197. According to the railroad, this element of its damage claim represented "lost business opportunities," in other words, a lost investment opportunity. *Id.* at 1198. This differs from PG&E's claim for its actual financing costs, such as interest payments on borrowed money. While it is true, as Fischbach says (Pet. at 17), that the *Southern Pacific* court equated the railroad's damage claim to interest ("compensation for the loss of use of money is, by definition, interest," *id.* at 1197), it was interest that the plaintiff "could have earned," *Marchese*, 781 F.Supp. at 247, rather than interest *it actually paid to someone else (hence, an actual cost) as a result of defendant's conduct.*

- In footnote 3 of its petition, Fischbach invites the Court's attention to a handful of cases arising under the ADEA, False Claims Act, National Bank Act or RICO statute, which it argues demonstrate that "often" courts will rule that double and treble damage awards are a "substitute for incidental damages such as the time value of money" and accordingly deny requests for prejudgment interest. (Pet. at 8, n.3.) As one might surmise from Fischbach's carefully worded statement, it is equally true that "often" courts will reach the exact opposite result and grant prejudgment interest to compensate plaintiffs for the time value of money notwithstanding that the plaintiff's compensatory damages will be doubled or trebled automatically. *See, e.g., Reichman v. Bonsignore, Brignati & Mazzotta P.C.*, 818 F.2d 278, 281-282 (2d Cir. 1987) (prejudgment interest awarded in ADEA action notwithstanding doubling of compensatory damages); *Bonura v. Chase Manhattan Bank, N.A.*, 629 F.Supp. 353, 363-66 (S.D.N.Y. 1986) (same); *Criswell v. Western Airlines,*

Inc., 709 F.2d 544, 556-57 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985) (ADEA action in which plaintiff was awarded prejudgment interest on compensatory damages as well as double compensatory damages); *Kelly v. American Standard*, 640 F.2d. 974, 982 (9th Cir. 1981) (same). The factors which seem to divide the courts involve such issues as whether the multiplication of compensatory damages is possibly compensatory itself or was legislated in order to serve punitive/detrimental goals. *Compare Fortino v. Quasar Co.*, 950 F.2d 389 (7th Cir. 1991) (an implicit, subsidiary purpose of ADEA multiple damages is to compensate plaintiff) *and Criswell*, 709 F.2d at 556-57 (ADEA multiple damages are punitive and intended to deter intentional violations).

We respectfully submit that the Court should decline Fischbach's invitation to detour into this thicket for a very good reason. All of the cases cited in Fischbach's footnote 3 and in this paragraph, whether or not they actually permit recovery of prejudgment interest, concern recovery for lost investment opportunities. Accordingly, they are far afield from the instant case which involves *only* actual financing costs PG&E incurred as a proximate result of the defendants' bid-rigging.

Fischbach's inability or unwillingness to accept the proper distinction between actual financing costs incurred by a plaintiff as a result of a defendant's conduct and interest that a plaintiff might have earned by investing money the defendant owed to plaintiff, if plaintiff had the money sooner, carries over into the antitrust cases upon which Fischbach relies:

- In *Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51 (2d Cir. 1971), *rev'd on other grounds*, 409 U.S. 363 (1973), the plaintiff airline was denied "*moratory interest*" as an element of its damages. 449 F.2d at

80. But, moratory interest is merely interest that a plaintiff *could have* earned on money owed it by the defendant(s). *See Amoco Rocmount Co. v. Anschutz Corp.*, 873 F.Supp. 1492, 1497 (D. Wyo. 1994). PG&E has not asked to have moratory interest included in its damages. Rather, the Ninth Circuit has said that PG&E can ask for its actual financing costs in a retrial.

- *Fishman v. Estate of Wirtz*, 807 F.2d 520 (7th Cir. 1986), also involved a damage claim for the missed opportunity to invest money. As the dissent put it, "[d]uring all of the time [the case was active], the defendants held the stakes and earned interest" but "[i]f [plaintiff] had owned the Bulls, it would have possessed (and invested) the profits." *Id.* at 583-84. Again, a decision about that kind of damage claim does not address actual financing costs a plaintiff incurs as a proximate result of bid-rigging, much less hold that such costs have been excluded from compensatory damages in antitrust cases by Congress. Indeed, the *Fishman* court itself drew a sharp distinction between hypothetical costs and actual, out-of-pocket costs. *Id.* at 556 n.34.

- Similarly, *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 877 (7th Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971), upon which the *Fishman* court relied, holds only that prejudgment interest "is not enumerated as a recoverable item" in the Clayton Act. 429 F.2d at 877. PG&E agrees, but the point is irrelevant because the decisions of the courts below in this case do not permit or even concern an award to PG&E of prejudgment interest. Fischbach petitions for relief from that part of the Ninth Circuit's decision that allows PG&E to seek recovery of actual financing costs.

- Finally, the same point distinguishes *Brooklyn Sav. Bank v. O'Neill*, 324 U.S. 697 (1945) and *Cape Cod Food Products, Inc. v. National Cranberry Association*, 119 F.Supp. 900 (D. Mass. 1954), which cites and relies upon *Brooklyn Savings*. In *Brooklyn Savings*, the Court determined only that plaintiff was not entitled to recover interest on his damages due to the "delay in the payment of the basic minimum wages," that is, prejudgment interest. 324 U.S. at 715. Again, that is not the kind of damages sought by PG&E nor addressed by the courts below.

Thus, Fischbach has cited no cases which hold that actual financing costs are not recoverable. Moreover, the cases Fischbach does cite are no basis upon which to declare that bid-rigging conspirators shall henceforth be exempt from all responsibility for financing costs they have caused their victims to incur. Indeed, Fischbach can cite no cases on point because there is no logical or rational reason why courts should not treat actual financing costs like all other proximately caused effects of an antitrust violation and allow plaintiffs, who have actually suffered a measurable increase in financing costs as a result of a violation, to recover those costs as part of their direct damages, in keeping with traditional authority on antitrust damages. A plaintiff's actual financing costs can be ascertained to a satisfactory level of certainty and shown to have been proximately caused by an antitrust violation. This distinguishes prayers for actual financing costs from prayers for the "loss of use of money," "lost opportunities," "moratory interest," or "prejudgment interest," which are likely to be more conjectural and difficult to prove and in every instance do *not* involve recovery for actual financing costs.

In contrast to Fischbach's reliance on prejudgment interest cases, that is, lost investment opportunity, the courts below relied upon two cases directly on point and completely sup-

portive of the proposition that actual financing costs are recoverable. *See Minpeco S.A. v. Hunt*, 686 F.Supp. 420, 426 (S.D.N.Y. 1988); *Minpeco, S.A. v. Hunt*, 718 F.Supp. 168 (S.D.N.Y. 1989) (same case); *United Power Ass'n, Inc. v. L.K. Comstock & Co.*, 1992-2 Trade Cas. (CCH) ¶ 70,055 (D. Minn. October 27, 1992). Fischbach's efforts to dismiss these cases as "wrongly-decided" (Pet. at 18-19) is inappropriate for the same reasons it is inappropriate to urge that the cases dealing with compensation for lost investment opportunity are relevant. Unlike Fischbach's cases, the *Minpeco* and *United Power* cases properly treat the issue of actual financing costs incurred as a proximate result of antitrust violations. They are not "wrongly-decided." (*Id.*) Moreover, they are not inconsistent with the result in the cases Fischbach cites because they consider a completely different issue.[6]

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[6] The extent to which *Minpeco* even addresses the issue of claims for prejudgment interest is limited, but definitely not helpful to Fischbach. The *Minpeco* court, 686 F.Supp. at 426-427, cites approvingly to *Bulk Oil, Inc. v. Sun Oil Trading Co.*, 697 F.2d 481 (2d Cir. 1983), in which the Second Circuit found that it was not only appropriate for the plaintiff to recover its actual financing costs (interest payments on a loan from Chase Manhattan Bank), but prejudgment interest on its financing costs damages as well:

> Bulk was forced to make monthly interest payments to Chase [Manhattan Bank] . . . [W]e have ruled that [defendant] must reimburse Bulk for Bulk's monthly [interest] payments (and also pay Bulk statutory [prejudgment] interest on the monthly payments). . . .

697 F.2d at 485-486.

Thus, in *Bulk Oil* (decided after *TWA*) the Second Circuit by the simple act of awarding prejudgment interest on actual financing costs plaintiff was forced to pay to a bank by the defendant's wrongful conduct, made it clear that financing costs and prejudgment interest are two, very distinct concepts.

Fischbach's own discussion of *Bulk Oil* is exceptionally misleading. (Pet. at 11 and 19.) The relevant portion of the *Bulk Oil* decision holds that statutory prejudgment interest can and should be awarded on the actual financing costs a plaintiff is forced to pay to a lender on account

PG&E's claim is for its actual financing costs for the defendants' illegal overcharges; it is not a claim for lost investment opportunities, such as profit or interest that it might have earned if it had used equivalent cash for something other than paying for the defendant's illegal overcharges. Thus, once again, Fischbach has avoided confronting PG&E's actual claim that it cost PG&E money to raise the money to pay for the defendants' illegal overcharges. Simply because PG&E is not permitted, except under certain circumstances, to maintain a claim for a lost investment opportunity it could have earned if it had invested the money it paid to defendants for their illegal overcharges, does not mean that PG&E cannot recover the actual financing costs it was forced to incur as a result of the defendants illegal overcharges. That is the distinction

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of the defendant's wrongful conduct *in addition to* awarding plaintiff its actual financing costs. 697 F.2d at 484-486. Fischbach ignores this and instead, by carefully editing its quotations from, and constructing its descriptions of, *Bulk Oil* asserts completely the opposite—that the Second Circuit held that "statutory prejudgment interest would duplicate the award for interest payments on the loan." (Pet. at 19, n.8.) As textual support for its contrived interpretation of *Bulk Oil*, Fischbach offers this heavily edited quotation from the decision: " 'Having recovered its actual [financing payments on a loan that it would have paid off had the contract not been breached] . . . . [a]n award of statutory interest would amount to a double recovery.' " (Pet. at 11) (quoting *Bulk Oil* at 485).

Nothing could be further from the truth than Fischbach's description of *Bulk Oil*. The Second Circuit's precise statement in *Bulk Oil* was simply that "[a]n award of statutory [prejudgment] interest would amount to a double recovery." *Id.* at 485. But, the Second Circuit was *not* describing its decision to award plaintiff prejudgment interest on interest payments on the loan plaintiff obtained, as Fischbach suggests, but rather prejudgment interest on the principle sum of the loan. *Id.* It said "[a]n award of statutory [prejudgment] interest to Bulk on the part . . . of the contract price which Bulk would have used to pay off the loan would be a windfall." *Id.* at 486. As the Second Circuit rightly pointed out, had the defendant paid the full contract price, Bulk Oil would have immediately paid off the principle of its loan, hence the actual use to which Bulk Oil would put that portion of the damage award was actually known. *Id.* at 485.

which *Minpeco* and *United Power* make, but which Fischbach ignores.[7]

II. THE LEGISLATIVE HISTORY FISCHBACH CITES IS IRRELEVANT.

Fischbach's legislative history argument (Pet. at 24-26) suffers from the same flawed logic that taints the balance of its petition; it presupposes that PG&E's actual financing costs are a form of prejudgment interest and proceeds to argue that because Congress severely restricted the availability of pre-

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[7] At pages 11-13 of its petition, Fischbach indulges in a further mischaracterization when it excerpts selected portions of the testimony of Mr. Avram Tucker, PG&E's damage expert, and asserts that those excerpts show that Mr. Tucker implicitly admitted at trial that PG&E's claim for its financing costs is really a claim for "the loss of use of money over time, or prejudgment interest." (Pet. at 13.) To the contrary, Mr. Tucker's testimony was quite clear. He testified that PG&E financed 100% of the cost of constructing Diablo Canyon and that he performed two separate analyses to determine a range of actual finance costs incurred by PG&E as a result of the illegal overcharge. (Pet. at 11-12.) One analysis involved PG&E's weighted average cost of capital. (Pet. at 12). The other analysis was based entirely on a study of PG&E's debt with absolutely no inclusion of any lost investment opportunity. (*Ibid.*)

Fischbach emphasizes that the way Mr. Tucker calculated financing costs "is similar to a method commonly used to calculate prejudgment interest in patent cases." (Pet. at 12.) That may well be, but it is irrelevant. The fact that prejudgment interest might be calculated based on a plaintiff's borrowing costs, as Fischbach's patent cases say, does not turn a plaintiff's borrowing costs into prejudgment interest. They may both be calculated by multiplying an interest rate or rates by a time period and a dollar amount, but they represent something quite different (*see* pages 5-14, *supra*), contrary to Fischbach's assertion (Pet. at 4) ("interest by any other name is still interest."). Although interest by any other name may be interest, Fischbach's statement overlooks the fact that there is a difference between earnings, such as interest gained by a plaintiff from an investment opportunity, and interest paid to a third-party by the plaintiff. The former represents income, the other a cost, or outflow. PG&E is seeking only to recover its acutal financing costs and not a lost investment opportunity.

judgment interest awards by enacting the 1980 Act, Congress also intended to restrict severely a plaintiff's ability to recover its actual financing costs incurred as a result of anti-competitive behaviour. As discussed in detail above, equating prejudgment interest, that is, a lost investment opportunity, with PG&E's actual financing costs for Diablo Canyon is simply wrong. Moreover, nothing in the history of the 1980 Act supports Fischbach's argument that the two are synonymous.

By adopting the 1980 Act, Congress sought to control the conduct of antitrust litigation by requiring litigants to pay prejudgment interest from the date of service of the complaint to the judgment, if they were found to have engaged in dilatory tactics. *See* H.R. 96-875 at 2-3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2766, 2767-2768. Accordingly, its consideration of the bills that evolved into the 1980 Act did not require an analysis of whether prejudgment interest was in effect a substitute for actual financing costs.

A thorough review of all available Congressional materials related to the 1980 Act reveals no discussion of the issue of actual financing costs, such as interest on loans, before or during litigation[8] and evinces no Congressional intent to

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[8] Fischbach argues that a Congressional intent to preclude recovery of actual finance costs can be gleaned from a Report of the House Committee on the Judiciary stating that small business plaintiffs are "denied use of [their] money during the litigation with no adjustment for inflation or the interest cost of borrowing money elsewhere." *(See* Pet. at 24 [*citing* H.R. Rep. No. 96-875 at 3 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2766, 2767].) The statement in question is taken out of context. It comes from a paragraph which addresses only the topic of "awarding prejudgment interest," or lost investment opportunity. Fischbach, however, tries to turn it into a reference to a plaintiff's actual financing costs. (Pet. at 24.) In fact, the passage expressly refers only to the "*defendant's* interest-free use" of *plaintiff's* money "with no adjustment" for plaintiff of "the interest cost [to defendant] of borrowing money elsewhere" during the pendency of the action. 1980 U.S.C.C.A.N. *supra*, at 2767. In other words, prior to the passage of the 1980 Act, a dilatory defendant could force the plaintiff to be his interest-free lender for as long as defendant could delay the final resolution of the litigation.

restrict an antitrust plaintiff's ability to recover, for example, interest it was forced to pay lenders in order to raise cash to pay an inflated, bid-rigged price to a conspirator.[9]

Fischbach's argument regarding the legislative history of the National Cooperative Research Act of 1984 (Pub. L. No. 98-462, 98 Stat. 1815 (1984)) (the "1984 Act") is equally faulty. The 1984 Act limited damages awarded to a successful plaintiff bringing an antitrust case challenging a joint research and development ("R&D") venture to actual rather than treble damages. 15 U.S.C.A. § 4303(a) (West Supp. 1996). The intent of the 1984 Act was to address the concern that the potential for treble damage antitrust actions chilled critical joint research and development projects. *See* S. Rep. No. 98-427, at 1-2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3105, 3105-3106. Because the damages under the 1984 Act are not trebled, Congress provided that an injured party may collect prejudgment interest from the earliest date (within the statute of limitations) that injury can be established to judgment. *See* 15 U.S.C.A. § 4303(a) (West Supp. 1996). Again,

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An award of prejudgment interest would allow a plaintiff to be compensated at the *defendant's* "interest cost of borrowing money elsewhere" rather than be an involuntary interest-free lender. (*Ibid.*) Once the statement is viewed in its proper context, it is obvious that the discussion cited by Fischbach has nothing to do with a *plaintiff's* cost of borrowing or other financing costs.

[9] *See, e.g., Antitrust Procedural Act of 1979: Hearings on S.390 Before the Subcomm. on Antitrust and Monopoly of the Senate Committee on the Judiciary,* 96th Cong. 30 (1979) (testimony of Honorable Charles B. Renfrew, U.S. District Judge) (discussing "the investment value of the money to be awarded" but never mentioning whether plaintiff's out-of-pocket financing costs should be included in the award.); *Id.* at 50 (testimony of Peter M. Gerhart, Ohio State Univ. law professor) ("The true justification for this amendment, it seems to me, is that when a defendant injures a plaintiff monetarily, the plaintiff is deprived of the use of money and thus of the interest he could have earned." There is no mention of whether a plaintiff's increased financing costs should properly be considered an injury.)

nothing in the Congressional discussion has any relevance whatsoever to the issue before the Court and Fischbach's reference to it should be discounted entirely.

III. FISCHBACH'S REASONS FOR REQUESTING A WRIT ARE SPECIOUS.

Fischbach's efforts to alarm the Court by its petition are specious. It claims that allowing PG&E to recover both prejudgment interest and treble damages involves an issue of exceptional importance. (Pet. at 27-28.) Maybe it would, if that were what the Ninth Circuit had decided. But, the court below decided something completely different. It simply ordered that on retrial PG&E could not be summarily precluded from introducing evidence of its actual financing costs for the illegal overcharges it paid, whatever financing tool it used. (App. at 18a.)

Fischbach also tries to alarm this Court by claiming that allowing PG&E to recover the increase in its actual financing costs as damages would allow antitrust plaintiffs to expand the amount of their damages "exponentially." (Pet. at 21.) However, damages are damages, no matter how large or small. They will not expand exponentially or otherwise by virtue of the Ninth Circuit's decision. An antitrust plaintiff has always been entitled to seek full recovery for all losses proximately caused by a defendant's violation. The Ninth Circuit's opinion does not purport to change that principle at all. Furthermore, the fact that a utility's financing costs associated with the construction of a nuclear plant may be very significant does not suggest that other antitrust plaintiffs have financing costs on a similar scale.

Regardless of the scale of a plaintiff's cost-of-capital, there is never a windfall that results from its recovery, as Fischbach intimates. (Pet. at 25.) Fischbach's suggestion that it is a windfall is premised on its notion that PG&E's actual financing costs are identical to prejudgment interest, that is, a lost

business opportunity. Whether or not prejudgment interest can be fairly called a windfall, recovery of a plaintiff's actual financing costs is not the equivalent of prejudgment interest. *See* pages 5-14, above. Thus, there is no reason for Fischbach to cry wolf. Indeed, if there is a windfall in the offing for anyone, it will go to Fischbach, which is trying to avoid paying for all of PG&E's damages. Furthermore, Fischbach's pious concern that allowing PG&E to recover its financing costs will somehow be harmful to economic activity in the United States is utterly ridiculous. The Ninth Circuit did not change any established law of damages, it simply followed a long-established principle that a plaintiff can recover all financing costs proximately caused by an antitrust violation.

Finally, Fischbach's suggestion that a writ should issue because there is a conflict between the Ninth Circuit's unpublished memorandum decision and all the cases Fischbach relies upon, thus making the issue one of considerable significance is also specious. (Pet. at 27-28.) There is no conflict between any of the cases cited by Fischbach and the Ninth Circuit's memorandum opinion because Fischbach's cases do not address the issue the Ninth Circuit's opinion addresses. Moreover, the doomsday scenario which Fischbach predicts will occur as a result of the Ninth Circuit's memorandum opinion is pure fantasy. The *Minpeco* court reached the same result, eight years ago and the analogous *Bulk Oil* decision is even older. If Fischbach's prediction were correct, the dire consequences would have occurred by now. But, they have not.

CONCLUSION

The rationale offered by Fischbach for issuing a writ was also offered by Fischbach to the courts below, citing all the same cases. It was properly rejected before and it has not improved with age. As the *Minpeco* and *United Power Ass'n.* decisions made clear, prejudgment interest and its functional equivalents like "moratory interest" or "loss of the use of money" or "lost opportunity costs" are not the same as a claim for actual financing costs incurred by a plaintiff, which if proximately caused by a violation should be recoverable. Because the memorandum decision issued by the Ninth Circuit follows traditional damage principles and contradicts no known reported case, a writ is not necessary.

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